TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 314

THE UNITED STATES, PLAINTIFF IN ERROR,

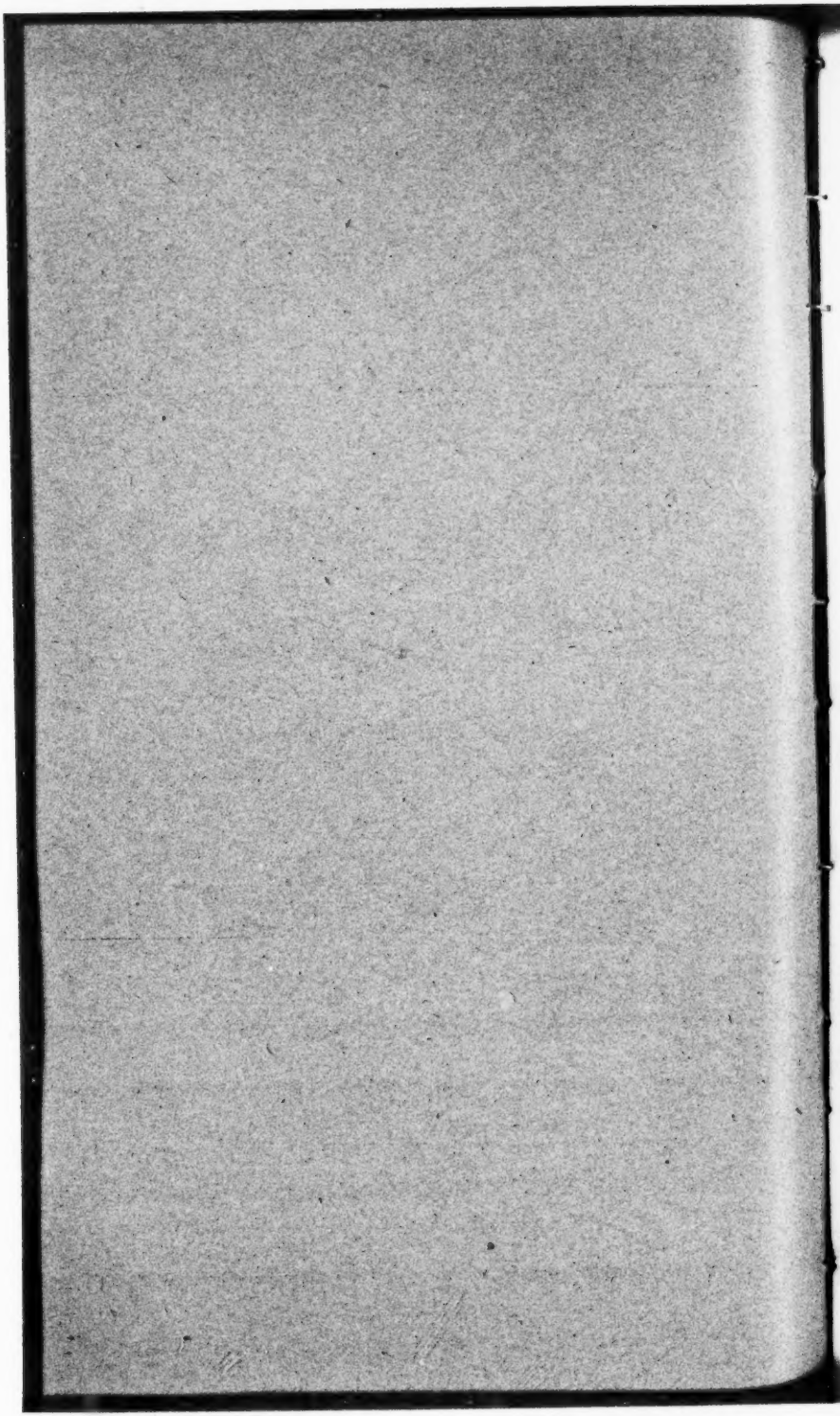
vs.

WILLIAM B. HAMMERS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED AUGUST 30, 1909.

(21807)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 581.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM B. HAMMERS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	a	1
Citation	c	2
Acceptance of service of citation	f	2
Names and addresses of attorneys	g	3
Return to writ of error	h	3
Caption	1	3
Indictment	2	3
Warrant and marshal's return	12	9
Arraignment and continuance	14	10
Demurrer to indictment	15	10
Hearing and submission of demurrer	16	11
Order sustaining demurrer	17	11
Clerk's certificate to judgment roll	18	12
Opinion on demurrer	19	12
Bill of exceptions	30	19
Demurrer to indictment	30	19
Opinion on demurrer	31	19
Judge's certificate to bill of exceptions	42	26
Acceptance of service of bill of exceptions	42	26
Order allowing bill of exceptions, writ of error, etc	43	27
Petition for writ of error	44	27
Assignment of errors	46	28
Order allowing writ of error	54	33
Judge's certificate	56	34
Order extending time to prepare bill of exceptions	58	35
Clerk's certificate	59	35
Order extending time to file record	61	36

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a *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Olin Wellborn, judge of the District Court of the United States for the Southern District of California, greeting:

Because in the record and proceedings, as also in the giving, making, rendition, entering, and filing of the decision and judgment sustaining the demurrer of the defendant, William B. Hammers, to the indictment in that certain cause in the said District Court of the United States for the Southern District of California, Southern Division, before you, in which the United States of America is plaintiff and the said William B. Hammers is defendant, a manifest error hath happened, to the great damage of the said plaintiff, the United States of America, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and
b proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 2nd day of August, in the year of our Lord one thousand nine hundred and nine, and of the independence of the United States the one hundred and thirty-fourth.

[SEAL.] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States, in and for the Southern District of California, Ninth Circuit.

The above writ of error is hereby allowed.

OLIN WELLBORN, *District Judge.*

c I hereby certify that a copy of the within writ of error was on the 2nd day of August, 1909, lodged in the clerk's office of the said United States District Court for the Southern District of California, for the said defendant in error.

[SEAL.] E. H. OWEN,

Clerk of the United States District Court, Southern District of California.

d Service upon me of the within writ of error is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Indorsed:) No. 166 Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Writ of error. Filed Aug. 2, 1909. E. H. Owen, clerk.

e *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to William B. Hammers, defendant in error, and to Messrs. Valentine & Newby, his attorneys, greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein the United States of America is plaintiff, and you, the said William B. Hammers, are defendant in error, to show cause, if any there be, why the decision and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, this 2nd day of August, A. D. 1909, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] OLIN WELLBORN,
District Judge for the Southern District of California.

Attest:
E. H. OWEN,
Clerk, U. S. District Court,
Southern District of California.

f Service upon me of the within citation is hereby acknowledged by receiving a copy thereof, this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorneys for defendant Wm. B. Hammers.

(Indorsed:) No. 166 Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Citation. Filed Aug. 2, 1909. E. H. Owen, clerk.

g *Names and addresses of attorneys.*

For plaintiff in error: A. I. McCormick, United States attorney for the Southern District of California; Henry M. Willis, assistant United States attorney for the Southern District of California.

For defendant in error: L. H. Valentine, 445 Wilcox Building, Los Angeles, California; Nathan Newby, 445 Wilcox Building, Los Angeles, California.

h The answer of the judge of the District Court of the United States of America, in and for the Southern District of California.

The record and all proceedings of the indictment whereof mention is made, with all things touching the same, we certify under the seal of our said District Court to the United States Supreme Court, in a certain schedule to this writ annexed, as within we are commanded.

By the Court:

E. H. OWEN,
Clerk, U. S. District Court, Southern District of California.

1 In the District Court of the United States, in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs. No. 166. Crim.
WILLIAM B. HAMMERS, DEFENDANT.

2 In the District Court of the United States, in and for the Southern District of California, Southern Division.

At a stated term of said court, begun and holden at the city of Los Angeles, county of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday in January, in the year of our Lord one thousand nine hundred and nine, the grand jurors of the United States of America, chosen, selected, and sworn within and for the division and district aforesaid, on their oath present:

That William B. Hammers, whose full and true name, other than as herein stated, is to the said grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to wit, on the 30th day of January, 1908, at the town of El Centro, in the county of Imperial, State, division, and district aforesaid, and within the jurisdiction of this honorable court, did commit wilful and corrupt perjury, that is to say:

That heretofore, to wit, on the 14th day of August, 1907, one Granville M. Boyer, desiring to avail himself of the benefits of the public-land laws of the United States relating to desert lands and entries thereon, did, under and by virtue of said public-land laws of the United States, and, in particular, under and by virtue of the act of Congress approved March 3, 1877 (19 Statutes at Large, 1096),

make and file at and in the United States land office at said city of Los Angeles, county, State, division, and district aforesaid, his application and declaration under oath to enter, and was then and there allowed to and did then and there enter, under said acts of Congress, certain of the public lands of the United States
3 then situated at and within the county of San Diego, but now at and within the county of Imperial, in the Los Angeles, California, land district, State, division, and district aforesaid, and described as follows, to wit: A rectangular piece of land containing two hundred and forty (240) acres, in township 16 south, range 12 east, San Bernardino meridian, and being three-quarters (3/4) of a mile in length east and west and one-half mile in width north and south, the said described lands being then and there vacant, unappropriated, and surveyed public lands of the United States and open to entry, settlement, reclamation, and the obtaining of patent thereto under the said public-land laws of the United States relating to desert-land entries and said acts of Congress above mentioned, and he, the said Granville M. Boyer, being then and there and at all times in this indictment mentioned a citizen of the United States, and the said entry being numbered 3903 of the records of said land office of the United States; that thereafter, to wit on the 26th day of August, 1907, the said Granville M. Boyer did, by an instrument in writing in that behalf, duly executed by him, assign, transfer, and set over unto one Beulah Rose Beekler all interests acquired by him under and pursuant to and by virtue of said desert-land entry No. 3903, in and to said land, and did deliver his said assignment, in writing, of all his right, title, and interest in and to the said entry, being numbered 3903 as aforesaid, and in and to the said lands described and embraced in said entry, to said Beulah Rose Beekler, she, the said Beulah Rose Beekler, being then and there and at all times in this indictment mentioned a citizen of the United States, and she, the said Beulah Rose Beekler, did, on the said last mentioned date, duly file the said assignment with the register and receiver of the United States land office at the city of Los Angeles, county of Los Angeles, division and district aforesaid; that
4 under and by virtue of the said assignment of said desert-land entry No. 3903, as aforesaid, by the said Granville M. Boyer to the said Beulah Rose Beekler, she, the said Beulah Rose Beekler, did then and there acquire and succeed to all of the rights, title, interest, obligations, and duties in and respecting said entry and said lands which had been possessed by and had rested upon said Granville M. Boyer after the date of his said entry, to wit, August 14, 1907, and prior to the date of his said assignment, to wit, August 26, 1907, under the said public-land laws of the United States relating to desert-land entries; that thereafter, to wit, on the 30th day of January, 1908, and while said desert-land entry No. 3903 was pending before the register and receiver of the said United States land office at said city of Los Angeles, she, the said Beulah Rose Beekler, in pretended compliance with the said public-land laws of the United

States and the said acts of Congress and the rules and regulations of the General Land Office of the Department of the Interior of the United States in such case made and provided, did, according to the provisions of said public-land laws of the United States relating to desert-land entries, apply at the office of one Daniel S. Elder, clerk of the Superior Court of Imperial County, within the State and Southern Division of the Southern District of California, at the town of El Centro, to make her first yearly proof of improvement, irrigation, reclamation, and cultivation of said land, hereinbefore described and embraced in said desert-land entry No. 3903 and in said assignment, with the intent and for the purpose of thereafter procuring and obtaining from the United States patent to said lands; that the said Daniel S. Elder, as such clerk of said court, was then and there empowered and authorized by the said public-land laws of the United States relating to desert-land entries to receive the first yearly proof of improvement, irrigation, reclamation,
5 and cultivation of said described lands and to administer the oaths required by the said public-land laws of the United States relating to desert land entries to the witnesses presented by said Beulah Rose Beekler to testify and make affidavits in support of her said first yearly proof of improvement, irrigation, reclamation, and cultivation of said lands as aforesaid.

And the grand jurors aforesaid, on their oath aforesaid, do further present:

That the said William B. Hammers, whose full and true name is, as aforesaid, to the said grand jurors unknown, on the said 30th day of January, 1908, at the said town of El Centro, county, State, division, and district aforesaid, in pretended compliance with the terms and provisions of the acts of Congress hereinbefore referred to, and in pretended compliance with the rules and regulations of the General Land Office and of the Department of the Interior of the United States, in such case made and provided, did appear and was present at the said office of said clerk to testify and make affidavit as a witness for and on behalf of said applicant, Beulah Rose Beekler, assignee of the said Granville M. Boyer as aforesaid, and for the purpose of thereby enabling the said Beulah Rose Beekler to secure patent and title to said land from the United States, in the matter of the said desert land entry and in the making of her said first yearly proof of improvement, irrigation, reclamation, and cultivation of said land as aforesaid, and then and there, did, as such witness for and on behalf of said Beulah Rose Beekler, as aforesaid, and for the purposes aforesaid, subscribe certain written testimony which had on said date been given by him, the said William B. Hammers, before the said clerk of the said Superior Court of the said county of Imperial, State, division, and district aforesaid, to wit, before
6 the said Daniel S. Elder, who was then and there and at the time of the taking and giving of said testimony acting in his official capacity as such clerk of said Superior Court as aforesaid, and he, the said William B. Hammers, so having subscribed the

said testimony as aforesaid, did, then and there, to wit, on the said 30th day of January, 1908, wilfully, knowingly, unlawfully, corruptly, and feloniously, take an oath before said Daniel S. Elder as such clerk of said Superior Court of said county of Imperial as aforesaid, he, the said Daniel S. Elder, being then and there a public officer, to wit, the duly elected, qualified, and acting county clerk of Imperial County, State of California, and ex-officio clerk of the Superior Court of said Imperial County, the said Superior Court being then and there a court of record, and the said Daniel S. Elder, as such clerk, being then and there duly qualified and competent to administer said oath, under and pursuant to which said oath, he, the said William B. Hammers, did state and swear that said written testimony and each and every statement therein, so given and subscribed by him, the said William B. Hammers, as aforesaid, was true; that in giving said written testimony, which was so subscribed and sworn to by him, the said William B. Hammers, as aforesaid, and as a part thereof, he, the said William B. Hammers, did, knowingly, wilfully, unlawfully, and corruptly state and testify, for the purposes aforesaid, before the said clerk of said Superior Court of said county above named, amongst other things, certain material matter in substance and to the effect following, that is to say:

I am well acquainted with the land described and embraced in said desert land entry No. 3903, as aforesaid, made at the United States land office at Los Angeles, California, by the said Granville M. Boyer and assigned by said Granville M. Boyer to the said Beulah Rose Beekler (meaning and referring to the said land in township 16 south, range 12 east, San Bernardino meridian, containing two hundred and forty acres as above set forth). There was expended the sum of two hundred and fifty ($250.00) dollars—the said sum being not
7 less than one dollar per acre for each acre of said land embraced in said desert land entry No. 3903—in necessary irrigation, reclamation, and cultivation of the said land during the first year after the date of said entry (meaning after the date of said entry by Granville M. Boyer, to wit, August 14, 1907, and prior to the date of the taking of the said oath and giving and subscribing the said testimony by the said William B. Hammers before the said Daniel S. Elder, clerk of the Superior Court of Imperial County, to wit, January 30, 1908, as aforesaid). Said sum of two hundred and fifty ($250.00) dollars was expended in and for labor and bordering and leveling said land (meaning said land described and embraced in said desert land entry No. 3903, as aforesaid). Of the said sum of two hundred and fifty ($250.00) dollars so expended in necessary irrigation, reclamation, and cultivation of the said land (meaning said land embraced in desert land entry No. 3903) one hundred and eighty ($180.00) dollars thereof was expended during the interval of time indicated above, to wit, between August 14, 1907, and January 30, 1908, in the construction of twelve miles of borders on said land (meaning said land described and embraced in said desert land entry No. 3903, as aforesaid), at a cost of fifteen ($15.00) dollars per mile. The remainder of the said sum of two hundred and fifty ($250.00)

dollars, to wit, the sum of seventy ($70.00) dollars, so expended in the necessary irrigation, reclamation, and cultivation of said land, was expended during the said interval of time, to wit, between August 14, 1907, and January 30, 1908, in and for ten days' work with a four-horse team and a Fresno scraper at the rate of seven ($7.00) dollars per day in leveling the said land (meaning the said land embraced in said desert land entry No. 3903). My knowledge in regard to the existence of said improvements (meaning the said construction of the said twelve miles of borders on said land at the rate of fifteen
8 ($15.00) dollars per mile and the said ten days' work with a four-horse team and a Fresno scraper at the rate of seven ($7.00) dollars per day in leveling said land) was obtained from personal examination, and the values thereof (meaning the values of the said borders, to wit, fifteen ($15.00) dollars per mile or a total value of one hundred and eighty ($180.00) dollars, and the value of the said leveling of the said land, to wit, ten days' work with a four-horse team and a Fresno scraper at the rate of seven ($7.00) dollars per day or a total value of seventy ($70.00) dollars) are reasonably stated.

Which said statements and testimony so subscribed and sworn to by him, the said William B. Hammers, as aforesaid, that the sum of two hundred and fifty ($250.00) dollars was expended, during the interval of time aforesaid, in necessary improvement, irrigation, reclamation, and cultivation of said land, consisting of constructing twelve miles of borders at fifteen ($15.00) dollars per mile on said land, or a total expenditure of the sum of one hundred and eighty ($180.00) dollars for that purpose, and ten days' work with a four-horse team and Fresno scraper at seven ($7.00) dollars per day, or a total expenditure of the sum of seventy ($70.00) dollars, in leveling said land, were, and each of them was, then and there, material to the said first yearly proof of improvement, irrigation, reclamation, and cultivation of said land pursuant to said entry under the aforesaid acts of Congress in such case made and provided, and were material to the proof necessary to ultimately enable said Beulah Rose Beckler to obtain patent and title to said land from the United States, and were, and each of them was, then and there and at the time they were so made, given, subscribed, and sworn to by him, the said William B. Hammers, as aforesaid, and at all times, false and untrue, and known and believed by him, the said William B. Hammers,
9 to be false and untrue, and which said statements and testimony he, the said William B. Hammers, did not then and there believe to be true; the truth and the facts then and there being, as he, the said William B. Hammers, then and there and at the time of so making, giving, and subscribing said testimony and taking said oath thereto before said Daniel S. Elder, clerk of the Superior Court of Imperial County, California, as aforesaid, well knew, that the sum of two hundred and fifty ($250.00) dollars had not been expended during said interval of time, to wit, after August 14, 1907, and prior to the said 30th day of January, 1908, or at or during any other time, or at all, in necessary improvement, irrigation, reclamation, and cultivation of

said land, and that no other sum, or any sum whatsoever, in excess of the sum of twenty-five ($25.00) dollars, had then and there or at any time been expended in necessary improvement, irrigation, reclamation, and cultivation, or in the necessary improvement, or irrigation, or reclamation, or cultivation, of said land, embraced in said desert land entry No. 3903; that the sum of one hundred and eighty ($180.00) dollars had not been expended during said interval of time, to wit, after August 14, 1907, and prior to said 30th day of January, 1908, or at any other time, or at all, in the construction of twelve miles of borders upon said land, and that no other sum, or any sum whatsoever in excess of the sum of twenty-five ($25.00) dollars, had then and there, or at any time prior to the taking of said oath, been expended in the construction of borders upon said land; that the sum of seventy ($70.00) dollars had not, nor had any part thereof, or any other sum or any sum whatsoever, been expended during said interval of time, to wit, after August 14, 1907, and prior to the said 30th day of January, 1908, or at any time, or at all, in leveling the said land in and by employing ten days work with a four-horse team and a Fresno scraper thereon at the rate of seven ($7.00) dollars per day, or in any other manner, or by any other means, or at any other rate, or at all; all of which was then and there and at the time he, the said William B. Hammers, so subscribed said testimony and took said oath as aforesaid, well known to him, the said William B. Hammers;

That the only work or improvement done or made in the necessary irrigation, reclamation, or cultivation of the said land, described above, and embraced in said desert land entry No. 3903, during the said interval of time, from the date of said entry, to wit, August 14, 1907, to the date of the taking of said oath, to wit, the said January 30, 1908, consisted of four days' work of one man with a four-horse team and a plow in the pretended construction of about seven miles of alleged borders on said land; that the amount expended in and for the said work and improvement did not exceed the sum of twenty-five ($25.00) dollars, and the said improvem*tus*, to wit, the said alleged borders, were not of any value exceeding the value of twenty-five ($25.00) dollars;

That thereafter, to wit, on the fifteenth day of February, 1908, the said written testimony, so made, given, subscribed, and sworn to, for the purposes aforesaid, by said William B. Hammers, as such witness as aforesaid, at the time and place aforesaid, was duly filed with the said register and receiver of the said United States land office at said city of Los Angeles, as a part of said proceedings in relation to said desert land entry No. 3903, which were then and there pending before said register and receiver, as aforesaid.

Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

A. I. McCORMICK,
United States Attorney.

11 (Endorsed:) No. 166. Crim. United States District Court, Southern District of California. Southern Division. The United States of America vs. William B. Hammers. Indictment for violation section 5392, R. S. Perjury. A true bill. R. H. Howell, foreman. Presented and filed in open court, this 30th day of April, A. D. 1909. E. H. Owen, clerk.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: F. C. Prescott, G. C. Hunt, D. S. Elder, J. C. Thompson, J. A. Hoblit, Granville M. Boyer, M. P. Adams.

12 UNITED STATES OF AMERICA,
Southern District of California, ss.

To the marshal of the United States of America, for the Southern District of California, and his deputies, or any or either of them, greeting:

Whereas, at a District Court of the United States of America for the Southern District of California, begun and held at the [SEAL] city and county of Los Angeles, within and for the district aforesaid, on the 30th day of April, in the year of our Lord one thousand nine hundred and nine, the grand jurors in and for the said district, brought into the said court a true bill of indictment against William B. Hammers for violation section 5392 R. S., perjury, as by the same indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said William B. Hammers has not yet appeared or pleaded:

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said William B. Hammers and him bring before the said court, at the United States District Court room, in the city and county of Los Angeles, to answer the indictment aforesaid.

Witness, the Hon. Olin Wellborn, judge of the said District Court, and the seal thereof, at the city and county of Los Angeles, the 30th day of April, A. D. 1909.

Attest:

E. H. OWEN, *Clerk.*

A. I. McCORMICK,
U. S. Attorney.

MARSHAL'S OFFICE.
United States of America, Southern District of California.

In obedience to the warrant I have the body of the said William B. Hammers before the honorable the District Court of the
13 United States, in and for the Southern District of California, this 3rd day of May, A. D. 1909.

LEO V. YOUNGWORTH,
U. S. Marshal.

By B. H. FRANKLIN,
Deputy U. S. Marshal.

(Endorsed:) Marshal's Doc. No. 3282. No. 166, Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Wm. B. Hammers. Bench warrant. Bail fixed at $1,000. A. I. McCormick, U. S. attorney. Filed May 3d, 1909. E. H. Owen, clerk.

14 At a stated term, to wit, the January term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the seventh day of June, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable Olin Wellborn district judge.

THE UNITED STATES OF AMERICA, plaintiffs, *vs.* WM. B. HAMMERS, DEFENDANT.	No. 166. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

Henry M. Willis, esq., and Frank Stewart, esq., assistant U. S. attorneys, present as counsel for the United States; defendant present in court, with his attorney, L. H. Valentine, esq. This cause coming on this day for the arraignment of defendant and the entry of his plea, and defendant having been called and arraigned, having stated that his true name is William B. Hammers, and having waived the reading of the indictment, it is thereupon, good cause appearing therefor, ordered that said cause be, and the same hereby is, continued until Monday, the 14th day of June, A. D. 1909, at 10.30 o'clock a. m., for hearing upon a demurrer to the indictment, and for the entry of the plea of defendant.

15 In the District Court of the United States, Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs. Demurrer.
WILLIAM B. HAMMERS, DEFENDANT.

Comes now the above named defendant and demurs to the indictment in the above entitled cause, and for such demurrer alleges that said indictment does not state facts sufficient to constitute an offense against the United States of America.

VALENTINE & NEWBY,
Attorneys for Defendant.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the Southern District of California, So. Div. United States of America, plaintiff, vs. William B. Hammers, defendant. Demurrer. Filed June 7th, 1909. E. H. Owen, clerk.

Received copy of the within this 7 day of June, 1909. F. Stewart, asst. U. S. atty., attorneys for pltf.

Valentine & Newby, rooms 443, 445, and 447 Wilcox Building, Los Angeles, Cal., attorneys for defendant.

16 At a stated term, to wit, the January term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 14th day of June, in the year of our Lord one thousand nine hundred and nine.

Present: The honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, plaintiffs, *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

A. I. McCormick, esq., U. S. attorney, and Henry M. Willis, esq., assistant U. S. attorney, present as counsel for the United States; defendant present in court, with his attorney, L. H. Valentine, esq. This cause coming on this day to be heard on defendant's demurrer to the indictment herein; and said demurrer having been argued, in support thereof, by L. H. Valentine, esq., attorney as aforesaid for defendant, and said demurrer having also been argued, in opposition thereto, by Henry M. Willis, esq., assistant U. S. attorney, and by A. I. McCormick, esq., U. S. attorney, and said demurrer having been argued by Shirley C. Ward, esq., as amicus curiæ; it is thereupon ordered that said cause be, and the same hereby is, submitted to the court upon briefs to be served and filed as follows, to wit: On behalf of defendant within five (5) days, and on behalf of plaintiffs within five (5) days thereafter, and on behalf of defendant in reply within five (5) days thereafter.

17 At a stated term, to wit, the July term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 12th day of July, in the year of our Lord one thousand nine hundred and nine.

Present: The honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, plaintiffs, *vs.* WM. B. HAMMERS, DEFENDANT.	No. 16. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

This cause having heretofore been submitted to the court for its consideration and decision, on a demurrer to the indictment herein, and the court having duly considered the same, and being fully advised in the premises, now reads and files its conclusions, and it is ordered that said demurrer be, and the same hereby is, sustained;

to which ruling of the court plaintiffs, by A. I. McCormick, esq., U. S. attorney, ask that exceptions be noted on behalf of the United States, which request is granted and said exceptions hereby noted herein.

18 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES
vs.
WM. B. HAMMERS. } No. 166. Crim.

I, E. H. Owen, clerk of the District Court of the United States in and for the Southern District of California, do hereby certify that the foregoing papers, hereto annexed, constitute the judgment roll in the above-entitled cause.

Attest, my hand and the seal of said court, this 12th day of July, A. D. 1909.

[SEAL.] E. H. OWEN, *Clerk.*

(Endorsed:) No. 166. U. S. District Court, Southern District of California, Southern Division. The United States vs. Wm. B. Hammers. Judgment roll. Filed July 12, 1909. E. H. Owen, clerk.

19 In the District Court of the United States for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

Conclusions of the court on demurrer.

The indictment in this case charges perjury based on an affidavit of annual expenditures, made under the desert land laws.

This annual proof was taken on the application of a person to whom the entryman assigned within two weeks after filing his declaration.

Defendant contends that the law did not authorize the assignment, and, therefore, the affidavit was immaterial; so that the only question presented by the demurrer is whether or not a desert land entry may be assigned before the work of reclamation has been completed.

This question, so far as concerns the desert land act of 1877 (19 Sta. L., 107; 2 U. S. Comp. Stat., 1901, page 1548), has been expressly decided by the Supreme Court of the United States in a case where it was squarely presented, and, together with other legal questions, disposed of in the following language:

"This brings us to the final contention * * * that the desert land entry by Williams in 1879 gave to him no right which he could sell or transfer. * * * In the main we do not doubt these propositions of law." (Williams vs. United States, 138 U. S., 514, 522–523.)

The Government contends, however, that desert land entries are made assignable by the act of 1891, 26 Stat. L., 1096; 2 U. S. Comp. Stat., 1901, page 1549.

20 The words of the act on which the Government relies are "he or his assignors," in section 5, and "the applicant or his assigns" and "assignment," in section 7, these two sections being among those which the act of 1891 added to that of 1877. Said sections are respectively as follows:

"SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent

21 at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land."

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made

under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States."

Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government. (Miles vs. Croft, 13 Wallace, 80 U. S., 291; Defflebach vs. Hawk, 115
22 U. S., 393, 405; U. S. vs. Freyberg, 32 Fed., 195; Smith vs. Ewing, 23 Fed., 741, 744.) This qualified power of alienation has never, so far as I know, been denied by any court, and the sections above quoted do nothing more than import its recognition. They contain no apt words for the grant or creation of a new right, but their phraseology is appropriate as an incidental reference to a right already existing.

By this construction effect is given, as I shall show, to every word in the statute, and the whole is harmonious; whereas, to hold that an entry is assignable before the work of reclamation has been performed directly contravenes many of its substantial provisions.

The Government's contention, so far as it rests upon section 5, assumes, among other things, that the pronoun "he" in the clause "he or his assignors," refers only to an assignee. This assumption, although seemingly fair, if we restrict our view to the clause itself, is manifestly wrong when the clause is read, as it should be, in the light of its context. Suppose a case where there has been no assignment, but the entryman himself has fully completed the work of reclamation, and applied for a patent. "He" would necessarily mean the entryman, and could not refer to an assignee, because there is no assignee. So that the character of the person to whom "he" refers depends upon the circumstances of each case. If there has been no assignment, but the work of reclamation is accomplished by the entryman who applies for the patent, then, as I have just shown, "he" can not refer to an assignee. If, however, the entryman, after completing the work of reclamation, assigns his entry, then the word "he" must refer to an assignee.

This view becomes unassailable when the section is fully analyzed. The first clause provides: "That no land shall be patented to any person under this act unless he or his assignors shall have
23 expended * * * at least three dollars per acre of the whole tract reclaimed and patented in the manner following," etc. The statute then proceeds to specify, with uncommon clearness, the person by whom, and the periods within which the expenditures shall be made, as follows: "Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid, and he," that is, the party so entering, "shall expend one dollar per acre during the second year and also during the third year thereafter, and that

said party," that is, the party so entering, "shall file during each year with the register proof by affidavits that the full sum of one dollar per acre has been expended in such necessary improvements during such year." The section further provides that if any party who has made such application shall fail to file the testimony aforesaid, the land shall revert to the United States, etc.

Thus, it will be seen that all of the requirements of the section as to expenditures are laid expressly upon the entryman, and that they are, of course, utterly incompatible with a right to assign before the requirements are fulfilled. From this conclusion there is no escape.

If Congress had intended to confer the right of assignment during the progress of the work of reclamation it would have inserted after each reference to the "entryman," in some appropriate way, the words "or his assigns." Nor can it be said that the failure to make these insertions was inadvertent, because the use of the words "or his assignors," in the second line of the section, shows unmistakably that Congress had that matter specifically in mind.

The views above expressed fully indicate the meaning of the words "the applicant or his assigns" in section 7 of said act:
24 that is to say, if the entryman himself has performed the work of reclamation and applies for the patent, then the patent will issue to him, or if, after completing the work of reclamation, he transfers his equitable estate, then the patent will issue to his assigns.

Moreover, there is to be found in section 7 strong confirmation of the construction which I have placed upon section 5, and it is as follows:

"That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land, and to the extent and cost, and in the manner aforesaid and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns."

The reclamation and cultivation, it will be seen, must be accomplished "in the manner aforesaid," that is, by the entryman himself, and in such event the patent may issue to him or his assigns.

The construction above indicated of the act of 1891 was subsequently adopted by Congress in "An act for the relief of persons who have filed declarations of intention to enter desert lands," etc., which is in part as follows (underscoring mine):

"That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof
25 may be made in each case is hereby extended to five years from the date of filing the declaration; and the requirement that

the persons filing such declarations shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with: Provided, that within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and *in the manner provided by existing law*, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as herein provided." (28 U. S. Stat. L., 226; 3 Comp. Stat., 1901, p. 1552.)

The foregoing analysis of sections 5 and 7 of the act of 1891, shows to my mind, almost with the certainty of a mathematical demonstration, that Congress, in passing the act of 1891, never intended or contemplated the absolute and unqualified assignability of desert land entries, and this view finds strong confirmation in the subsequent construction which Congress itself placed upon said act by the act of 1894, from which I have just quoted.

The conclusion above announced has received implied sanction from the Circuit Court of Appeals of the 8th Circuit, where it was said, referring to the desert-land act of 1877:

"There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title when perfected for the benefit even of a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation." (United States vs. McIntosh, 85 Fed., 333, 338.)

26 No decision by any court, giving a different construction to the act of 1891, has been called to my attention. Several cases construing other acts have been cited, among them Webster vs. Luther, 163, U. S., 331; Williamson vs. United States, 207 U. S., 425; Adams vs. Church, 193 U. S., 510; and United States vs. Biggs, 211 U. S., 507; and Rose v. Wood & Lumber Co., 73 Cal., 385; but they are but little, if at all, aidful in the present enquiry, because the statutory provisions with which they deal are different from those now before the court.

Arnold vs. Christy, 33 Pac. Rep., 619, 620, does not determine that a land entry is assignable, for the instrument there before the court was an executory agreement to convey after patent, as shown by the following extract from the body of the opinion:

"We know of no ruling of the Land Department holding that one who has entered desert lands in good faith may not make an agreement to convey the land after title shall vest in him. On the contrary, the Land Department has affirmatively recognized such agreement as valid, and as not affecting the rights of the entryman to obtain title. In the case of Lanktree vs. Vibrans, decided by Commissioner Sparks, and reported in 13 Copp, Landowner, 220, of January 1, 1887, it was held that such an agreement was not an assign-

ment of the entry, and not prohibited by any ruling of the department."

Phillips vs. Carter, 135 Cal., 601, does construe the desert-land laws. That case, however, so far from holding that an entry is assignable before reclamation, may be fairly invoked as an authority on the other side. The second paragraph of the syllabus is as follows:

"A right of entry under the desert-land act of 1877 in favor of one who had reclaimed the lans was assignable," etc.

In the body of the opinion is the following:

27 "The right of alienation or assignment, therefore, in the absence of imposed restrictions, vests in the entryman, and, as has been said, there is nothing in the law imposing such restriction, while, on the other hand, equitable considerations impel strongly to the view that such rights should be assignable. The case at bar is illustrative of this. Foster had filed his declaratory statement, paid twenty per cent of the purchase price, reclaimed the land by irrigation as required by law. He was not permitted to make his final payment and proof, because the right to do so had been peremptorily suspended by order of the Land Department. Foster, then, having done all that the law requires and being unable to obtain his patent, dies. To hold that his right, perfected in so far as he could perfect it, was not alienable and did not descend, would mean that the policy of the Government was to deprive his heirs of the fruits of his labor and expenditures, and leave the land, with all its improvements, open to the first comer who might obtain possession of it."

But it is said that the Interior Department has uniformly placed upon the act of 1891 a construction different from that above announced, and Mr. Trippet, of counsel for the defendants in criminal cases numbers 59, 60, and 61, Southern Division, in a note to the brief filed by him in said cases, has cited five decisions of the Interior Department showing its construction of the desert-land laws to be as above indicated, said decisions, the earliest of which was rendered December 22nd, 1895, and the last June the 16th, 1900, being as follows: Fred W. Kimble, 20 L. D., 67, 70, 71; Nevada So. Ry. Co., 22 L. D., 1 and 3; Thomas W. Jeremy (on review), 25 L. D., 375; Casquet et al. vs. Butler's Heirs et al., 27 L. D., 721; and Ellingson vs. Aitken, 30 L. D., 71, 73, and 74.

28 I have read these decisions carefully, and find that they do not attempt a full, or even partial, consideration of the various provisions of the desert-land acts bearing upon the question of assignability. In most if not all of said cases the right to assign seems to be assumed rather than deduced from careful or analytical examination of said acts. Whatever may be said of them, however, as arguments, they would, because of the high source from which they emanate and the probability that persons who have been interested in the acquisition of desert lands may have relied upon them as correct expositions of the law, be entitled, in the contingency below mentioned, to great weight. On this subject the rule has been often authoritatively an-

nounced that where a court is doubtful about the meaning of an act of Congress the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive, if not absolutely controlling. (United States vs. Union Pacific Co., 148 U. S., 562, 572; United States vs. Tanner, 147 U. S., 661, 663; United States vs. Graham, 110 U. S., 217, 221.) There are many other decisions to the same effect, some of which are referred to in the brief of Mr. Trippet as amicus curiæ, filed herein June 28th, 1909, but as the three cases which I have named state the rule as favorably to the Government as it is stated in any of the other cases, it is needless to multiply citations here. Under this rule, however, it must be noted that the practice of the department is not of itself sufficient to raise a doubt, for since, in cases of doubt, such practice is virtually controlling; to hold that it can also raise the doubt is to declare that an executive construction of a statute is binding upon the courts. This, of course, is not the law, but, on the contrary, the court must examine for itself the statute, and if, upon such examination, it seems ambiguous, then the practice of the department is entitled to the
29 weight above indicated; if, however, the words of the statute seem unequivocal, the court is bound to follow its own judgment as to their meaning, whatever may have been the rulings or practice of the department.

It has been said, during the progress of the argument in this and kindred cases, that under the rules and regulations adopted by the General Land Office, a large number of reclamations have been effected in Imperial Valley by assignees, who are now awaiting patents for the lands so reclaimed. This argument, if there were any doubts in my mind, would resolve them in favor of the Government's contention, but after a thorough and searching examination of the acts of 1877 and 1891, I am fully convinced that entries under said acts are not assignable before reclamation, and, under these circumstances, for me to hold otherwise would be to disregard my own convictions where duty enjoins their observance.

For some citations applicable here, see my conclusions filed November 6th, 1908, in the United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division, and also my conclusions this day filed in the cases entitled United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division, United States vs. Paul H. McPherrin et al., No. 60, Crim., Southern Division, and United States vs. Frank Chaplin et al., No. 61, Crim., Southern Division.

The demurrer to the indictment is sustained.

OLIN WELLBORN, *Judge*.

(Endorsed:) No. 166. Crim. U. S. District Court, Southern District of California, Southern Division. The United States vs. Wm. B. Hammers. Conclusions of the court on demurrer. Filed Jul. 12, 1909. E. H. Owen, clerk.

30 In the District Court of the United States, in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

Bill of exceptions.

Be it remembered that in this case the indictment was duly returned, presented, and filed in open court on the 30th day of April, 1909; that the defendant, William B. Hammers, was on the 7th day of June, 1909, duly and regularly arraigned on said indictment; and that, all due and regular proceedings being had, the said defendant, by his attorneys, Messrs. Valentine & Newby, did thereafter, to wit, on said 7th day of June, 1909, present and file his demurrer to the indictment in said cause, which said demurrer was and is in the words and figures following, to wit:

"In the District Court of the United States, Southern District of California, Southern Division.

"THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } Demurrer.

"Comes now the above-named defendant and demurs to the indictment in the above-entitled cause, and for such demurrer alleges that said indictment does not state facts sufficient to constitute an offense against the United States of America.

"(Signed) VALENTINE & NEWBY,
"*Attorneys for Defendant.*"

That all due and regular proceedings being had, the said demurrer was thereafter, to wit, on the 14th day of June, 1909, in open
31 court, argued by the respective parties to the said cause before said court, and upon the completion of said argument the matter was duly and regularly submitted to the said court for its decision and judgment; that after duly and regularly considering the same the said court did, to wit, on the 12th day of July, 1909, duly and regularly render, give, make, and enter its final decision and judgment in said cause, in and by which said decision and judgment the said court did sustain said demurrer, all for the reasons and upon the grounds, and those only, which are set forth in the certain written opinion then filed by the court in this cause, which opinion is in the words and figures following:

"In the District Court of the United States for the Southern District of California, Southern Division.

"THE UNITED STATES OF AMERICA, PLAINTIFFS. *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim.

"*Conclusions of the court on demurrer.*

"The indictment in this case charges perjury based on an affidavit of annual expenditures made under the desert land laws.

"This annual proof was taken on the application of a person to whom the entryman assigned within two weeks after filing his declaration.

"Defendant contends that the law did not authorize the assignment, and therefore the affidavit was immaterial; so that the only question presented by the demurrer is whether or not a desert land entry may be assigned before the work of reclamation has been completed.

"This question, so far as concerns the desert land act of 1877 (19 Sta. L., 107, 2 U. S. Comp. Stat., 1901, page 1548), has been expressly decided by the Supreme Court of the United States, in a case
32 where it was squarely presented, and, together with other legal questions, disposed of in the following language:

"'This brings us to the final contention * * * that the desert land entry by Williams in 1879 gave him no right which he could sell or transfer. * * * In the main we do not doubt these propositions of law.' (Williams vs. United States, 138 U. S., 514, 522–523.)

"The Government contends, however, that desert land entries are made assignable by the act of 1891, 26 Stat. L., 1096; 2 U. S. Comp. Stat., 1901, page 1549.

"The words of the act on which the Government relies are 'he or his assignors,' in section 5, and 'the applicant or his assigns' and 'assignment' in section 7, these two sections being among those which the act of 1891 added to that of 1877. Said sections are respectively as follows:

"'SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purpose aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per

acre has been expended in such necessary improvements during
33 such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land.'

"'SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent more than three hundred and twenty acres of such arid or desert lands: but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of
34 law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States.'

"Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government. (Miles vs. Croft, 13 Wallace, 80 U. S., 291; Defflebach vs. Hawk, 115 U. S., 393, 405; U. S. vs. Freyberg, 32 Fed., 195; Smith vs. Ewing, 23 Fed., 741, 744.) This qualified power of alienation has never, so far as I know, been denied by any court, and the sections above quoted do nothing more than import its recognition. They contain no apt words for the grant or creation of a new right, but their phraseology is appropriate as an incidental reference to a right already existing.

"By this construction effect is given, as I shall show, to every word in the statute, and the whole is harmonious; whereas, to hold that an entry is assignable before the work of reclamation has been performed directly contravenes many of its substantial provisions.

"The government's contention, so far as it rests upon section 5, assumes, among other things, that the pronoun 'he' in the clause 'he or his assignors,' refers only to an assignee. This assumption, although seemingly fair, if we restrict our view to the clause itself, is manifestly wrong when the clause is read, as it should be, in the light of its context. Suppose a case where there has been no assignment, but the entryman himself has fully completed the work of reclamation, and applied for a patent. 'He' would necessarily mean the entryman, and could not refer to an assignee, because there is no assignee. So that the character of the person to whom 'he' refers depends upon the circumstances of each case. If there
35 has been no assignment, but the work of reclamation is accomplished by the entryman who applies for the patent, then, as I have just shown, 'he' can not refer to an assignee. If, however, the entryman, after completing the work of reclamation, assigns his entry, then the word 'he' must refer to an assignee.

"This view becomes unassailable when the section is fully analyzed. The first clause provides: 'That no land shall be patented to any person under this act unless he or his assignors shall have expended * * * at least three dollars per acre of the whole tract reclaimed and patented in the manner following,' etc. The statute then proceeds to specify, with uncommon clearness, the person by whom and the periods within which the expenditures shall be made, as follows: 'Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid, and he,' that is, the party so entering, 'shall expend one dollar per acre during the second year and also during the third year thereafter, and that said party,' that is, the party so entering, 'shall file during each year with the register proof by affidavits that the full sum of one dollar per acre has been expended in such necessary improvements during such year.' The section further provides that if any party who has made such application shall fail to file the testimony aforesaid the land shall revert to the United States, etc.

"Thus, it will be seen that all of the requirements of the section as to expenditures are laid expressly upon the entryman, and that they are, of course, utterly incompatible with a right to assign before the requirements are fulfilled. From this conclusion there is no escape.

"If Congress had intended to confer the right of assignment during the progress of the work of reclamation it would have
36 inserted after each reference to the 'entryman,' in some appropriate way, the words 'or his assigns.' Nor can it be said that the failure to make these insertions was inadvertent, because the use of the words 'or his assignors,' in the second line of the section, shows unmistakably that Congress had that matter specifically in mind.

"The views above expressed fully indicate the meaning of the words 'the applicant or his assigns' in section 7 of said act; that is

to say, if the entryman himself has performed the work of reclamation and applies for the patent, then the patent will issue to him, or if, after completing the work of reclamation, he transfers his equitable estate, then the patent will issue to his assigns.

"Moreover, there is to be found in section 7 strong confirmation of the construction which I have placed upon section 5, and it is as follows:

"'That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land and to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns.'

"The reclamation and cultivation, it will be seen, must be accomplished 'in the manner aforesaid,' that is, by the entryman himself, and in such event the patent may issue to him or his assigns.

"The construction above indicated of the act of 1891 was subsequently adopted by Congress in 'An act for the relief of persons who have filed declarations of intention to enter desert lands,' etc., which is in part as follows (underscoring mine):

"'That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof may be made in each such case is hereby extended to five years from the date of filing the declaration; and the requirements that the *persons filing such declarations* shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with; Provided, That within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and *in the manner provided by existing law*, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as herein provided.' (28 U. S. Sta. L., 226; 3 Comp. Stat., 1901, page 1552.)

"The foregoing analysis of sections 5 and 7 of the act of 1891 shows, to my mind, almost with the certainty of a mathematical demonstration, that Congress in passing the act of 1891 never intended or contemplated the absolute or unqualified assignability of desert-land entries, and this view finds strong confirmation in the subsequent construction which Congress itself placed upon said act by the act of 1894, from which I have just quoted.

"The conclusion above announced has received implied sanction from the Circuit Court of Appeals of the 8th Circuit, where it was said, referring to the desert-land act of 1877:

"'There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title when per-
38 fected for the benefit even of a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation.' (United States vs. McIntosh, 85 Fed., 333, 338.)

"No decision by any court, giving a different construction to the act of 1891, has been called to my attention. Several cases construing other acts have been cited, among them Webster vs. Luther, 163 U. S., 331; Williamson vs. United States, 207 U. S., 425; Adams vs. Church, 193 U. S., 510; and United States vs. Biggs, 211 U. S., 507; and Rose v. Wood & Lumber Co., 73 Cal., 385, but they are but little, if at all, aidful in the present enquiry, because the statutory provisions with which they deal are different from those now before the court.

"Arnold vs. Christy, 33 Pac. Rep., 619, 620, does not determine that a land entry is assignable, for the instrument there before the court was an executory agreement to convey after patent, as shown by the following extract from the body of the opinion:

"'We know of no ruling of the land department holding that one who has entered desert lands in good faith may not make an agreement to convey the land after title shall vest in him. On the contrary, the land department has affirmatively recognized such agreement as valid and as not affecting the rights of the entryman to obtain title. In the case of Lanktree vs. Vibrans, decided by Commissioner Sparks, and reported in 13 Copp, Landowner, 220, of January 1, 1887, it was held that such an agreement was not an assignment of the entry, and not prohibited by any ruling of the department.'

"Phillips vs. Carter, 135 Cal., 604, does construe the desert-land laws. That case, however, so far from holding that an entry is assignable before reclamation, may be fairly invoked as an authority on the other side. The second paragraph of the syllabus
39 is as follows:

"'A right of entry under the desert-land act of 1877 in favor of one who had reclaimed the land was assignable, etc.

"In the body of the opinion is the following:

"'The right of alienation or assignment, therefore, in the absence of imposed restrictions, vests in the entryman, and, as has been said, there is nothing in the law imposing such restriction, while, on the other hand, equitable considerations impel strongly to the view that such rights should be assignable. The case at bar is illustrative of this. Foster had filed his declaratory statement, paid twenty per cent of the purchase price, reclaimed the land by irrigation, as required by law. He was not permitted to make his final payment and proof because the right to do so had been peremptorily suspended by order of the Land Department. Foster, then, having done all that the law

requires and being unable to obtain his patent, dies. To hold that his right, perfected in so far as he could perfect it, was not alienable and did not descend would mean that the policy of the Government was to deprive his heirs of the fruits of his labor and expenditures, and leave the land, with all its improvements, open to the first comer who might obtain possession of it."

"But it is said that the Interior Department has uniformly placed upon the act of 1891 a construction different from that above announced, and Mr. Trippet, of counsel for the defendants in criminal cases numbers 59, 60, and 61, Southern Division, in a note to the brief filed by him in said cases, has cited five decisions of the Interior Department showing its construction of the desert-land laws to be as above indicated, said decisions, the earliest of which was rendered December the 22nd, 1895, and the last June the 16th, 1900, being
40 as follows: Fred W. Kimble, 20 L. D., 67, 70, 71; Nevada So. Ry. Co., 22 L. D., 1 and 3; Thomas W. Jeremy (on review), 25 L. D., 375; Gasquet et al. vs. Butler's Heirs et al., 27 L. D., 721; and Ellington vs. Atken, 30 L. D., 71, 73, and 74.

"I have read these decisions carefully, and find that they do not attempt a full or even partial consideration of the various provisions of the desert-land acts bearing upon the question of assignability. In most, if not all of said cases, the right to assign seems to be assumed rather than deduced from careful or analytical examination of said acts. Whatever may be said of them, however, as arguments they would, because of the high source from which they emanate and the probability that persons who have been interested in the acquisition of desert lands may have relied upon them as correct exposition of the law, be entitled, in the contingency below mentioned, to great weight. On this subject the rule has been often authoritatively announced that where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive, if not absolutely controlling. (United States vs. Union Pacific Co., 148 U. S., 562, 572; United States vs. Tanner, 147 U. S., 661, 663; United States vs. Graham, 110 U. S., 217, 221.) There are many other decisions to the same effect, some of which are referred to in the brief of Mr. Trippet as amicus curiæ, filed herein June the 28th, 1909, but as the three cases which I have named state the rule as favorable to the Government as it is stated in any of the other cases, it is needless to multiply citations here. Under the rule, however, it must be noted that the practice of the department is not of itself sufficient to raise a doubt, for since, in cases of doubt, such practice is virtually controlling, to hold that it can also raise the doubt is to declare that an
41 executive construction of a statute is binding upon the courts. This, of course, is not the law, but, on the contrary, the court must examine for itself the statute, and if upon such examination, it seems ambiguous, then the practice of the department is entitled to the weight above indicated; if, however, the words of the statute seem unequivocal, the court is bound to follow its own judgment as to their

meaning, whatever may have been the ruling or practice of the department.

"It has been said, during the progress of the argument in this and kindred cases, that under the rules and regulations adopted by the General Land Office a large number of reclamations have been effected in Imperial Valley by assignees, who are now awaiting patents for the lands so reclaimed. This argument, if there were any doubts in my mind, would resolve them in favor of the government's contention, but, after a thorough and searching examination of the acts of 1877 and 1891, I am fully convinced that entries under said acts are not assignable before reclamation, and, under these circumstances, for me to hold otherwise would be to disregard my own convictions where duty enjoins their observance.

"For some citations applicable here, see my conclusions filed November 6th, 1908, in United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division; and also my conclusions this day filed in the cases entitled United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division; United States vs. Paul H. McPherrin et al., No. 60, Crim., Southern Division; and United States vs. Frank Chaplin et al.

"The demurrer to the indictment is sustained.

"(Signed) OLIN WELLBORN, *Judge*."

To which said decision and judgment of the court, so, for the reasons and upon the grounds aforesaid, sustaining the said demurrer to the said indictment, and to the whole thereof, the United
42 States of America, plaintiff in said cause, by its counsel, then and there duly excepted, which said exception was then and there duly and regularly entered in the minutes of said court.

And, forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this, its bill of exceptions, and prays that the same may be signed and allowed and duly authenticated and made a part of the record herein, which is accordingly done this 2nd day of August, 1909.

OLIN WELLBORN,
District Judge.

Service of the foregoing proposed bill of exceptions is hereby admitted this 2nd day of August, 1909, and it is hereby stipulated that the same is correct and may be settled, approved, and allowed as the bill of exceptions to be used upon writ of error from the Supreme Court of the United States in the above-entitled cause.

VALENTINE & NEWBY,
Attorneys for Defendant, William B. Hammers.

(Endorsed:) Original. No. 166. Crim. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Bill of exceptions. Filed Aug. 2, 1909. E. H. Owen, clerk.

43 At a stated term, to wit, the July term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 2nd day of August, in the year of our Lord one thousand nine hundred and nine:

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS, *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

Henry M. Willis, esq., and Frank Stewart, esq., assistant U. S. attorneys, present as counsel for the United States. Now comes Henry M. Willis, assistant U. S. attorney, and presents a petition for writ of error and an assignment of errors, which are filed in open court; thereupon there is also filed a writ of error to the Supreme Court of the United States herein, issued out of the Circuit Court of the United States for the Southern District of California, Southern Division, and a citation thereon is issued and filed in open court, and also a certificate of the court on writ of error, and a bill of exceptions, which is settled, signed, and filed.

44 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS, *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim.

Petition for writ of error.

The United States of America, plaintiff in the above-entitled action, feeling itself aggrieved by the decision and judgment of the above-entitled court, rendered, given, made, and entered on the 12th day of July, 1909, sustaining the demurrer of the above-named defendant to the indictment in this action, comes now and petitions said court for an order allowing said plaintiff, the United States of America, to prosecute a writ of error to the honorable the Supreme Court of the United States, from said decision and judgment, and the whole thereof, under and according to the laws of the United States, and especially under and by virtue of the provisions of the act of Congress of March 2, 1907, chapter 2564, 34 Sta. at L., 1246, in that behalf made and provided, and said the United States of America prays that said petition for said writ of error may be allowed, and that a proper transcript of the record, proceedings, and papers upon which said decision and judgment was rendered, given,

made, and entered as aforesaid, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated this 2nd day of August, 1909.

THE UNITED STATES OF AMERICA,
By A. I. McCORMICK,
United States Attorney.

Service upon me of the within petition for writ of error is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

45 VALENTINE & NEWBY,
Attorney for defendant, Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Petition for writ of error. Filed Aug. 2, 1909. E. H. Owen, clerk.

46 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. | No. 166. Crim.

Assignment of errors.

Now comes the United States of America, plaintiff herein, and says that in the record and proceedings in the above-entitled cause there is manifest error, and now makes, presents, and files the following assignment of errors, upon which said the United States of America will rely upon the prosecution of the writ of error in the above-entitled cause:

I.

That the District Court of the United States in and for the Southern District of California, Southern Division, erred in sustaining the demurrer interposed by the defendant, William B. Hammers, to the indictment in the said cause.

II.

That the said District Court erred in holding, deciding, and adjudging that said indictment did not state a public offense against the laws of the United States.

III.

That the said District Court erred in holding, deciding, and adjudging that the act of Congress approved March 3, 1877 (19 Stat. at L., 107; U. S. Comp. Stat., 1901, p. 1548), as amended and supplemented by act of Congress approved March 3, 1891 (26 Stat. at L.,

1095; Comp. Stat., 1901, p. 1549), and the subsequent acts amendatory thereof and supplemental thereto, all known as the desert land acts, do not authorize or permit an assignment of an entry of desert lands made under said desert land acts at any time prior to the completion of the reclamation and cultivation to the extent
47 and cost and in the manner required by said acts, and in basing its said decision and judgment sustaining said demurrer on that ground.

IV.

That the said District Court erred in its construction of said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, known as the desert land acts, wherein and whereby it held and decided that said desert land acts do not authorize or permit an assignment of an entry of desert lands made under said desert land acts at any time prior to the *the* completion of the reclamation and cultivation to the extent and cost and in the manner required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

V.

That the said District Court erred in holding, deciding, and adjudging that an assignment of an entry of desert lands made under the said desert land acts is not, at any time prior to the completion of reclamation and cultivation to the extent and cost and in the manner required by said acts, permitted or authorized by said desert land acts and is unlawful and void, and in basing its decision and judgment sustaining said demurrer on that ground.

VI.

That the said District Court erred in its construction of said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, known as the desert land acts, wherein and whereby it held and decided that an assignment of an entry of desert lands made under the said desert land acts is not, at any time prior to the completion of reclamation and cultivation to the extent and cost and in the manner required by said acts, permitted or authorized by
48 said desert land acts and is unlawful and void, and in basing its decision and judgment sustaining said demurrer on that ground.

VII.

That the said District Court erred in its construction of the said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, wherein and whereby it held and decided that Congress in passing said acts did not intend or contemplate the absolute and unqualified assignability of desert land entries lawfully initiated under

said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

VIII.

That the said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that Congress, in passing said act, did not intend or contemplate the absolute and unqualified assignability of desert land entries under said desert land acts, and in basing its decision and judgment sustaining said demurrer on that ground.

IX.

That the said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that said act of March 3, 1891, did not permit or authorize an assignment of an entry under said desert land acts, at any time or at all, prior to the completion of reclamation and cultivation to the extent and cost and in the manner required by said desert land acts, and in basing its decision and judgment sustaining said demurrer on that ground.

X.

That the said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that said act of March 3, 1891, prohibited and made unlawful an assign-
49 ment of an entry under said desert land acts at any time prior to complete reclamation and cultivation as required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XI.

That said District Court erred in its construction of said acts of March 3, 1877, and the acts amendatory thereof and supplemental therto, known as the desert land acts, wherein and whereby it held and decided that said acts of March 3, 1877, and the acts amendatory thereof and supplemental thereto prohibited and made unlawful an assignment of an entry under said desert land acts at any time prior to complete reclamation and cultivation as required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XII.

That said District Court erred in holding, deciding, and adjudging that an assignment of a bona fide entry of desert lands made under and by virtue of said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto by a qualified entryman, is not authorized or permitted by said acts and is unlawful and void and that therefore an oath taken by a proof witness before a competent and

qualified officer to an affidavit of the annual expenditure for the first year on said assigned entry (said oath being taken and said affidavit made for and on behalf of the assignee of said entry and as a part of the proceedings on and concerning said entry and with the intention and for the purpose of being thereafter filed with the register of the proper United States land office as a part of said proceedings), is not an oath in any case in which any law of the United States authorizes an oath to be administered, and in basing its decision and judg-
50 ment sustaining said demurrer on that ground.

XIII.

That the said District Court in holding, deciding, and adjudging that an oath taken before a qualified officer by a proof witness to an affidavit of the annual expediture required by said act of March 3, 1891, in a proceeding on an entry of desert lands under said desert land acts made in good faith by a qualified entryman and which said entry had been in good faith assigned prior to the taking of said oath, said affidavit being for and on behalf of said assignee, is not an oath taken "in any case in which a law of the United States authorizes an oath to be administered," as provided by section 5392 Rev. Stat., and in basing its decision and judgment sustaining said demurrer on that ground.

XIV.

That said District Court erred in its construction of section 5392 of the Revised Statutes of the United States, wherein and whereby it held and decided that the crime of perjury as defined in said section 5392 is not and can not be committed by a person who, as a proof witness for and on behalf of the assignee of an assigned desert land entry, takes an oath before a competent officer, and under said oath swears falsely to material matters in the affidavit of annual expenditures made by said assignee for the first year as required by said desert land acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XV.

That said District Court erred in its construction of section 5392 of the Revised Statutes of the United States wherein and whereby it held and decided that an oath taken by a proof witness for and on behalf of an assignee of a bona fide entry under said desert land
51 acts, before a competent officer, to an affidavit of the annual expenditure and reclamation for the first year on said assigned entry (said oath being taken and said affidavit made for and on behalf of the assignee of said entry and as a part of the proceedings on and concerning said entry and with the intention and for the purpose of being thereafter filed with the register of the proper United States land office as a part of the proceedings on said entry as required by

said desert land acts), is not an oath taken "in any case in which a law of the United States authorizes an oath to be administered," as provided in and by said section 5392 of the Revised Statutes of the United States, and in basing its decision and judgment sustaining said demurrer on that ground.

XVI.

That said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that said act did not grant or create the right of assignment of an entry of desert lands under said desert land acts at any time or at all prior to the completion of the reclamation and cultivation as required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XVII.

That said District Court erred in its construction of the said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, all known as the desert land acts, wherein and whereby said court held and decided that under and by virtue of said desert land acts, and especially under and by virtue of the act of March 3, 1891, no one but the party making the original desert land entry, that is to say, no one but the original declarant, could lawfully make the expenditures or perform the work or make or file the proof required by said act for the first three years, or either or any of said
52 years, and that, therefore, an oath taken by a proof witness before a competent and qualified officer to an affidavit of the annual expenditure for the first year on an assigned desert land entry (said oath being taken and said affidavit made for and on behalf of the assignee of said entry and as a part of the proceedings on said entry and with the intention and for the purpose of being thereafter filed with the register of the proper United States land office as a part of said proceedings) is not an oath in any case in which a law of the United States authorizes an oath to be administered, and in basing its decision and judgment sustaining said demurrer on that ground.

XVIII.

That said District Court erred in holding, deciding, and adjudging that the oath of the defendant, William B. Hammers, which said oath was taken and administered under the circumstances and for the purposes set forth and alleged in the indictment, was not an oath taken in any case in which any law of the United States authorizes an oath to be administered, and that the offense of perjury as defined in section 5392, Revised Statutes, could not be predicated upon said oath.

XIX.

That said District Court erred in refusing to overrule said demurrer of the said defendant and in refusing to compel said defendant to plead to said indictment.

Wherefore the said United States of America, plaintiff herein, prays that the said decision and judgment of the said District Court of the United States for the Southern District of California, Southern Division, and the whole thereof, be in all things reversed, and that the United States District Court be directed to reinstate said indictment and to overrule the demurrer of the said defendant, and to compel the said defendant to plead to the indictment in
53 said cause.

A. I. McCORMICK,
United States Attorney for the Southern District of California, and Attorney for Plaintiff.

Service upon me of the within assignment of errors is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Assignment of errors. Filed Aug. 2, 1909. E. H. Owen, clerk.

54 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

Order allowing writ of error.

Upon reading and filing the petition of the United States of America, plaintiff in the above entitled cause, praying for the allowance of a writ of error in the above entitled cause returnable before the Supreme Court of the United States, and upon reading and filing the assignment of errors presented with said petition, and on motion of A. I. McCormick, esq., United States attorney for the Southern District of California and attorney for plaintiff herein,

It is hereby ordered that the said petition be, and the same is hereby, allowed and granted; and

It is further ordered that a writ of error be and the same hereby is allowed to have reviewed in the Supreme Court of the United States the decision and judgment of this court sustaining the demurrer of the defendant to the indictment in this action, heretofore given, made, rendered, and entered in the above entitled cause, and that said writ

of error be issued by the clerk of the Circuit Court for this district, under the seal of said Circuit Court, pursuant to section 1004 of the Revised Statutes of the United States; and

It is further ordered that a certified transcript of the record, proceedings, and papers herein be transmitted to the said Supreme Court of the United States.

55 Dated this 2nd day of August, 1909.

OLIN WELLBORN,
Judge of the United States District Court,
Southern District of California.

Service upon me of the within order allowing writ of error is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, So. Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Order allowing writ of error. Filed Aug. 2, 1909. E. H. Owen, clerk.

56 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEPENDANT. } No. 166. Crim.

Certificate of court.

I, the undersigned, Olin Wellborn, United States district judge for the Southern District of California, do hereby certify that the decision and judgment in the above entitled cause, given, made, rendered, and entered by this court on the 12th day of July, 1909, and which said decision and judgment the plaintiff, The United States of America, is taking to the Supreme Court of the United States by writ of error, and in and by which said decision and judgment the demurrer to the indictment was sustained, was based solely upon the construction of the act of Congress approved March 3, 1877, entitled "An act to provide for the sale of desert land entries in certain States and Territories" (19 Statutes at Large, 107; U. S. Comp. Statutes, 1901, page 1548), as amended and supplemented by the act of Congress approved March 3, 1891, entitled "An act to repeal timber culture laws and for other purposes" (26 Statutes at Large, 1095; Comp. Stat., 1901, page 1549), and the subsequent acts of Congress amendatory thereof and supplemental thereto, all known as the desert land acts, and of section 5392 of the Revised Statutes of the United States.

I further certify that the reasons and grounds for the said decision and judgment are given and set forth in full in the written

conclusions of this court filed in this court on the 12th day of July, 1909, a copy of which said conclusions are incorporated in the bill of exceptions in this cause.

Dated this 2nd day of August, 1909.

OLIN WELLBORN,
District Judge.

57 Service upon me of the within certificate of court is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the Southern District of California. Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Certificate of court. Filed Aug. 2, 1909. E. H. Owen, clerk.

58 In the District Court of the United States in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT.

Order extending time.

Good cause appearing therefor, it is hereby ordered that the United States of America, plaintiff in the above entitled cause, may have and is hereby given up to and including the 11th day of August, 1909, in which to prepare, serve, and file its bill of exceptions in the above entitled cause.

OLIN WELLBORN,
District Judge.

Dated this 22d day of July, 1909.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Order extending time. Filed July 21st, 1909. E. H. Owen, clerk.

59 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

I, E. H. Owen, clerk of the District Court of the United States of America in and for the Southern District of California, do hereby certify the foregoing fifty-eight (58) typewritten pages, numbered from 1 to 58, inclusive, and comprised in one (1) volume, to be a full, true, and correct copy of the records, pleadings, and all proceedings

and papers upon which the demurrer to the indictment was sustained and the indictment dismissed, also of the bill of exceptions, petition for writ of error, assignment of errors, order allowing writ of error, certificate of the judge in the above entitled cause, and that
60 the same together constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court of the United States of America, this 14th day of August, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] E. H. OWEN.
Clerk United States District Court in and for the Southern District of California.

61 In the District Court of the United States in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT.

Order extending time within which the writ of error and the citation herein is returnable.

Good cause being shown therefor, and in accordance with subdivision 4, rule 9, of Rules of the Supreme Court of the United States of America, it is hereby ordered that the time within which the writ of error and the citation allowed and issued in the above entitled action is made returnable, and within which the plaintiff in error is required to docket said cause and file the record thereof with the clerk of said Supreme Court, be, and the same is hereby, extended and enlarged to sixty days from the second day of August, 1909, on which said day said citation was signed.

Dated this 13th day of August, 1909.

OLIN WELLBORN,
District Judge.

62 Service of the within order by copy thereof is hereby admitted this 14th day of August, 1909.

VALENTINE & NEWBY,
Attorneys for William B. Hammers.

(Indorsed:) No. . In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff vs. William B. Hammers, defendant. Order extending time within which the writ of error and the citation herein is returnable.

(Indorsement on cover:) File No. 21807. S. California D. C. U. S. Term No. 581. The United States, plaintiff in error, vs. William B. Hammers. Filed August 30th, 1909. File No. 21807.

O

Office Supreme Court, U. S.
FILED.
MAR 20 1911
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1909. 1910

No. ~~381~~ 314

United States of America,
Plaintiff in Error,
vs.
William ~~H.~~ B. Hammers,
Defendant in Error.

Motion for Leave to File Brief and Make Oral Argument as Amici Curiae.

OSCAR A. TRIPPET,
J. M. ESHELMAN,
LECOMPTE DAVIS and
WM. C. PRENTISS.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1909.

No. 581.

United States of America,
Plaintiff in Error,
vs.
William B. Hammers,
Defendant in Error.

Motion for Leave to File Brief and Make Oral Argument as Amici Curiae.

Now come Oscar A. Trippet, J. M. Eshleman LeCompte Davis and Wm. C. Prentiss, attorneys for Frank N. Chaplin and David H. Chaplin, defendants in the case of United States v. Chaplin, *et al.*, now pending in the U. S. Circuit Court of Appeals for the Ninth Circuit, and respectfully ask leave as *amici curiae* to file a brief and make an oral argument herein, attacking the construc-

tion placed by plaintiff and defendant herein upon section 1 of the Desert Land Act of March 3rd, 1877, entitled, "An Act to Provide for the Sale of Desert Lands in Certain States and Territories" (19 Stats. 377), which construction is involved herein, being invoked by the defendant as sustaining its claim that a desert land entry cannot be assigned before completion of reclamation of the entered land, and also attacking the construction placed by the defendant Hammers and by the lower court in this case upon section 5 of the amendment to the Desert Land Act of March 3rd, 1891 (26 Stats. 1095).

OSCAR A. TRIPPET,
J. M. ESHLEMAN,
LECOMPTE DAVIS, and
WM. C. PRENTISS.

And in support of this motion, your petitioners respectfully represent and show unto the court that the true construction of said section 1 of the original desert land act of March 3, 1877, is directly involved in and is conclusive of the case of U. S. v. F. N. Chaplin, *et al.*, now pending in the U. S. Circuit Court of Appeals for the Ninth Circuit, from the Southern District of California, and that the decision of this court in this case as to the true construction of such section will materially affect and be decisive of the rights of the defendant in that case. And your petitioners further represent and show that the

construction placed by the defendant Hammers and by the lower court in this case upon section 5 of the amendment to the Desert Land Act of March 3rd, 1891, and necessarily involved in the decision of this case by this court will materially affect the rights of the defendants in the said pending case of United States v. Chaplin. That this may more fully appear to the court, your petitioners respectfully show and represent to the court as follows:

That upon July 12, 1909, the District Court of the United States for the Southern District of California, Southern Division (Honorable Olin Wellborn, judge), in the present case of United States v. Hammers, sustained a demurrer to an indictment for perjury based upon the falsity of an affidavit of first annual proof made by an assignee of a desert land entry; the affidavit alleging the expenditure by such assignee of one dollar per acre during the first year after such entry, in reclaiming from its desert state, the land in question. The lower court held that as the law did not permit a desert land entry to be assigned prior to the completion of reclamation, an oath by the assignee prior to the completion of reclamation, showing money expended by him in reclamation, was not authorized by law, and hence perjury could not be predicated upon the falsity of such an oath; therefore, the demurrer to the indictment was sustained by the lower court.

The government appealed from such decision to this court, and the question directly involved here is, "Can an entryman of desert lands lawfully sell or assign his entry before completion of reclamation of the entered land?" Upon this appeal counsel for defendant Hammers maintains that a desert land entry cannot be lawfully assigned until after the completion of the reclamation of the entered land; and as one of the reasons for so claiming, such counsel maintain (in an advance draft of their brief in this case furnished us) that this cannot be done because section 1 of the original Desert Land Act requires that a desert land entryman must, at the time of original entry, *intend* to personally reclaim the entered land, and *therefore* he must *actually* personally *reclaim* the land, and *cannot assign it before reclamation*, and that reclamation cannot be made by the assignee, and proof of reclamation cannot be made by the assignee. Counsel for defendant Hammers also relies upon section 5 of the amendment to the Desert Land Act of March 3rd, 1891, as sustaining the view that a desert land entry can not be assigned before completion of reclamation of the entered land.

The government, on the other hand, maintains that the entryman may lawfully assign his entry at any time after it is made and before the completion of the reclamation, and that reclamation may be made by the assignee and proof of recla-

mation made by the assignee. The government, however, concurs in the construction placed by defendant Hammers upon section 1 of the original Desert Land Act, and concedes the claim made by the defendant Hammers that a desert land entryman must, at the time of the original entry, *intend* to personally reclaim the entered land and cannot *intend* to sell or assign his entry before the completion of the reclamation. And the government is now contending for and urging this position in the case of United States v. Chaplin, now pending in the Circuit Court of Appeals, for the Ninth Circuit, the government having succeeded in inducing the trial court in such case to so hold, and such decision is now being cited and relied upon by the defendant Hammers here as sustaining his position in this case. It will therefore be seen that upon this question of the necessity of the entryman's *intent* to personally reclaim the entered land, the government and defendant Hammers both maintain that such *intent* is essential to a valid entry.

On the same day upon which the lower court rendered its decision in this, the Hammers case, namely, upon July 12, 1909, and immediately prior to rendering such decision, the same court (Honorable Olin Wellborn, judge) also rendered the decision in the case of United States v. Frank N. Chaplin, *et al.*, above mentioned, overruling a demurrer interposed to an indictment charging

the defendants therein with conspiracy to defraud the United States of the use and possession of and title to certain desert lands in the Imperial Valley in California under the provisions of the United States Desert Land Laws. The indictment in such case charges that the defendants had conspired to induce parties to make desert land entries who would not intend, at the time of making such entries, to reclaim the same by conducting water thereon within four years. The demurrer to the indictment raises the point that the law does not require a desert land entryman, at the time of entry, to *intend* to personally reclaim the land by conducting water thereon within four years, but that such an entry could be lawfully made, although the entryman intended to sell or assign his entry to any qualified assignee at the first opportunity offering; and hence it is claimed by the defendants in that (the Chaplin) case, that a conspiracy to cause desert land entries to be made by parties who would not intend to personally reclaim the entered land, but who would intend to sell or assign their entries before the completion of reclamation, is no offense. This position the lower court rejected and the demurrer to the indictment was overruled. The case came on for trial, and the defendants Frank N. Chaplin and David H. Chaplin were found guilty as charged and were sentenced to a fine and imprisonment. The case was taken

upon writ of error to the Circuit Court of Appeals for the Ninth Circuit, and is now pending in such court, and on the docket to be heard at the May term of such court, this year. The bill of exceptions in such case waives all questions except those raised by the demurrer to the indictment.

The court will see at a glance the similarity of the questions involved in this case, and in that case, and the respect in which the decision in this case will affect the decision in that case.

First. If this court should hold in this case, as contended by the defendant Hammers, that a desert land entry cannot be assigned before the completion of the reclamation of the lands entered, it would naturally follow that a desert land entryman could not *intend* to assign his entry before completion of reclamation, and this conclusion would not only affect, but might be decisive against, and fatal to, the contention of the defendants in the Chaplin case.

Second. If the court should hold in this case that a desert land entryman could lawfully assign his entry at any time after the entry was made, and should not pass upon the question as to whether or not a desert land entryman could, at the time of making his entry, *intend* to assign it, such a decision would be of great value to, but not necessarily decisive of the defendant's contention

in the Chaplin case, as it would enable the defendant to argue that as the right to assign is a lawful right, and an assignment a lawful act, the right to intend to exercise a lawful right, or to do a lawful act, could not be criminal.

Third. If, however, the court should in this case hold that a desert land entryman need not *actually* reclaim, or *intend* to reclaim, but that he could *actually assign* and could, when he made his original entry, *intend to assign,* then such a decision of the court would be conclusive of the pending case of U. S. v. Chaplin, in favor of the defendants Chaplin.

Fourth. Should the court in this case hold, as contended by the government, that a desert land entryman may lawfully assign his entry at any time after it is made, but that he cannot, at the time of entry, *intend* so to do, this latter conclusion would be fatal to the contention of the defendants in the case of U. S. v. Chaplin; and in view of the fact that in this case, both the defendant Hammers and the government are concurring in the contention that a desert land entryman cannot, at the time of entry, *intend* to assign his entry before completion of reclamation, the danger of the court concurring in the correctness of such construction of the law,—when this construction is strongly urged by one party and conceded to be correct by the other,—is most immi-

nent; and as this position, if taken by the court, would be fatal to the defense of the defendants in the Chaplin case, the importance of an appearance in behalf of, and argument in support of the claim made by the Chaplins in their pending case, is more obvious than it would be if one of the parties to this case were presenting to the court and contending for the view of the law necessary to sustain the defendant's position in the Chaplin case.

Ordinarily, the views of an *amicus curiae* are in harmony with those being presented by one or the other of the parties to the controversy in which he seeks to be heard, and he usually merely desires to present further or supplemental points, arguments or authorities in harmony with such views. But in this case both of the parties litigant, we believe will concur in contending for a construction of the law that is fatal to the rights of the party applying to be heard as *amicus curiae*, and which construction, if adopted by the court, would pre-judge against such party the law of his case upon a purely *ex-parte* argument.

As *amici curiae*, we claim that a desert land entryman need not reclaim, nor *intend* to reclaim the entered land, but may assign and *intend* to assign, and that the assignee may lawfully reclaim. The defendant Hammers in this case will claim that the entryman must *both reclaim* and *intend* to reclaim, and cannot *either assign* or *intend* to as-

sign, and that the assignee cannot lawfully reclaim or make proof thereof.

The government will claim that the entryman need not *actually* reclaim, but must *intend* to reclaim, and that the entryman can assign, but cannot *intend* to assign.

It will thus be seen that we differ from both the appellee and appellant in that we maintain that an entry need not be made with an *intent* of reclaiming, but may be made with an *intent* of assigning, and that we agree with the government and differ with the appellee, in that we hold that the entryman need not actually reclaim, but that an entry may be assigned, and that reclamation may be made by an assignee direct or remote of the entryman.

Both counsel for the government and counsel for the defendant Hammers concede that since the Desert Land Act was amended in 1891, the Land Department has uniformly held that desert land entries may be assigned at any time after they are made, and that reclamation may be made by the assignee and proof of reclamation made by the assignee, and patent issue to the assignee. Under the decision, however, of the lower court, in this, the Hammers case, this practice of the Land Department is held to be illegal, and it is held that an assignee of a desert land entry may with impunity swear falsely as to the moneys expended by him in reclamation—*the very vital, es-*

sential feature of the law—and yet be immune from criminal prosecution for perjury; while the same court has held in the Chaplin case, *supra,* that if a desert land entryman, relying upon the practice permitting assignments prevailing in the Land Department for all these years, makes an entry merely *intending* to assign it before reclamation,—as he had for eighteen years been allowed by the Land Department to do,—he is guilty of perjury, and those who advise him he can so do, are guilty of conspiracy to defraud the United States.

In the advance draft of their brief in this case, which has been furnished us, counsel for the defendant Hammers cite, quote from, rely upon and invoke the soundness of the decision of Judge Wellborn in the case of U. S. v. Chaplin, *et al.* The government, while it is maintaining the soundness of such decision and seeking to sustain it in that case, now pending in the Circuit Court of Appeals, is possibly precluded in this case from taking a contrary position, no matter how sound such contrary view may be, or how essential such contrary view may be to meet the most formidable argument urged here by the attorneys for Hammers. At any rate, the government in this case,—while it may claim that the law of the Chaplin case is not necessarily involved in this case,—will probably not attack, and will probably contend for the soundness of the

decision of the lower court in the Chaplin case. This emphasizes the necessity and importance of attorneys for the Chaplins being permitted to be heard in this case as *amici curiae,* to present such contrary view, so that it may be shown, as we believe it can be shown, that the lower court erred both in the Chaplin case and in this case, and that it may be shown how, and wherein, the error of the lower court in its reasoning in the Chaplin case is responsible for its error in this case.

Therefore, the undersigned respectfully asks leave of court to file a brief herein, and to make an oral argument herein as *amici curiae.*

OSCAR A. TRIPPET,
J. M. ESHELMAN,
LECOMPTE DAVIS and
WM. C. PRENTISS.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
WILLIAM B. HAMMERS. } No. 581.

MOTION TO ADVANCE.

The defendant in error was indicted for perjury in the District Court of the United States for the Southern District of California.

On August 14, 1907, Granville M. Boyer made an original entry of certain desert lands, and on August 26 of that year he made a written assignment and transfer thereof to Buelah Rose Beekler. On January 30, 1908, Beekler, as the assignee of said land entry, and then owner thereof, made her first annual proof as required by the desert-land act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1096), using the defendant in error and Josephine Hammers, his wife, as her proof witnesses. For alleged false testimony then given the defendant in error and Josephine Hammers were separately indicted for perjury.

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Demurrers to the indictments were interposed on the ground that the act of 1877, as amended, does not authorize or permit the assignment of desert land entries, and the proof offered by Beekler was not in a proceeding authorized by any law, and that therefore the alleged false swearing by Hammers and his wife was not under oath "in any case in which a law of the United States authorizes an oath to be administered," as provided by section 5392 of the Revised Statutes. The District Court sustained the demurrers, and the Government has sued out this writ of error under the provisions of the act of March 2, 1907 (34 Stat., 1246).

Action on the demurrer to the indictment in the case of Josephine Hammers is withheld pending the determination of this case.

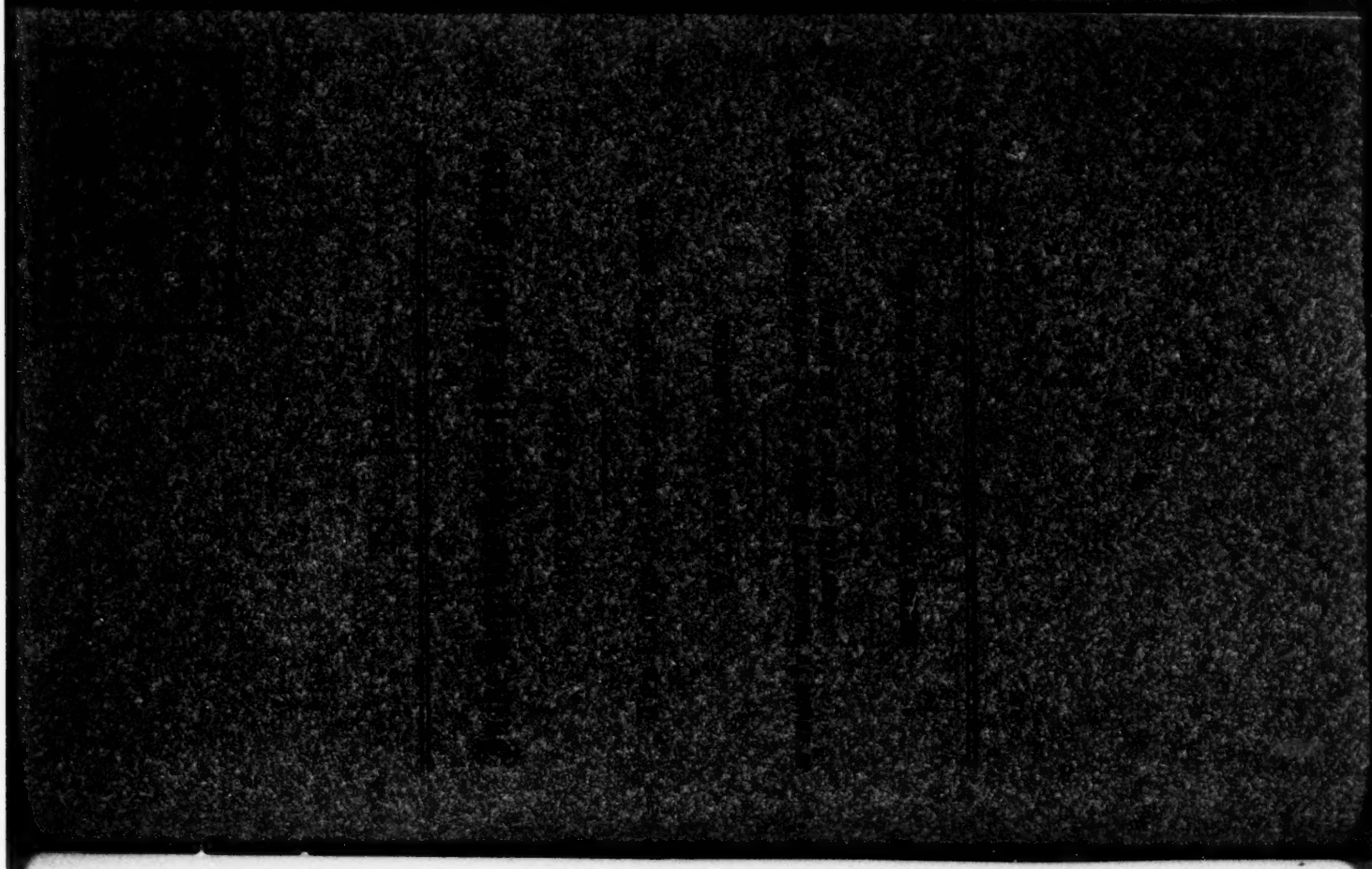
In accordance with the provision of the act of March 2, 1907, that writs of error thereunder "shall be diligently prosecuted and shall have precedence over all other cases," the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on a day during the present term.

Notice of this motion has been served upon counsel for defendant in error in the court below.

LLOYD W. BOWERS,
Solicitor-General.

DECEMBER, 1909.

O



In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN error,
v.
WILLIAM B. HAMMERS. } No. 314.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is brought here by writ of error taken pursuant to the act of March 2, 1907 (34 Stat. L., 1246), to review a decision (R. 11) of the district court for the southern district of California, sitting in the southern division thereof, sustaining a general demurrer (R. 15) to an indictment charging William B. Hammers with perjury in violation of section 5392 of the Revised Statutes. The alleged false testimony was given by Hammers when called as a witness in support of an entry of desert land originally made by one Boyer but then claimed by a woman

named Beekler under an assignment from Boyer. The desert land laws, which will be set out fully in the proper place, provide that, during each of the three years next succeeding the preliminary entry of desert land, proof shall be made by at least two credible witnesses of the expenditure of the full sum of one dollar per acre in the necessary reclamation, improvement, etc., of the land during that year; and that failure to file such testimony during any such year shall work a reverter of the lands to the United States and a forfeiture of the advanced payment of twenty-five cents per acre required to be made with the filing of the initial declaration.

Another law (hereinafter quoted) allows such testimony to be taken before clerks of state courts of record for transmission to the register and receiver with whom the entry is pending. Act of March 4, 1904, 33 Stat. 59, amending R. S., sec. 2294.

The indictment (R. 2 et seq.), in a single count, alleges, in apt form, that the defendant, Hammers, appeared at a place within the jurisdiction of the trial court as a witness in a proceeding before one Daniel S. Elder, Clerk of the Superior Court of Imperial County, California, a court of record, in which proceeding Beekler was making her first yearly proof of improvement, irrigation, reclamation and cultivation of land claimed by her under the Desert Land Laws; and that Hammers, being duly sworn as such witness by the said clerk, wilfully, knowingly, unlawfully, corruptly and feloniously made oath to the

truth of written testimony, then and there subscribed by him, wherein he falsely stated, (in substance) that the sum of two hundred and fifty dollars—that is, not less than one dollar for each acre of the land embraced in the desert claim, was expended in necessary irrigation, reclamation and cultivation of the land during the first year after the date of the entry thereof, and set forth in detail how the money was applied. The purpose of Beekler's application, it is averred, was to comply in form with the laws under which the entry was made, in order that she might ultimately procure a patent for the land. In appropriate fashion the indictment charges that Elder, the clerk, was in his official capacity authorized by the public land laws of the United States to receive the proofs, and was duly qualified and competent to administer the oath; that the matters sworn to by Hammers were material to the first yearly proof of improvement, irrigation, reclamation and cultivation of the land, pursuant to the entry, under the acts of Congress in such case made and provided, and material to the proof necessary to enable Beekler ultimately to obtain patent; and that the purpose of Hammers in giving the testimony was to assist Beekler toward getting her patent. With careful specification it falsifies the testimony given, which, it adds, was subsequently filed, as part of the proceedings relating to the entry, with the register and receiver of the United States Land Office in which the entry proceedings were pending.

The pleading as such was not criticized, and doubtless is beyond criticism. The feature which afforded the sole ground for the lower court's decision is found in the averments which show that the testimony was given in support of Beekler's claim *as assignee* of the original entryman. The trial court held (see opinion R. 12, 20):

> First. That the assignment was not authorized by the desert land laws.
>
> Second. That, therefore, the false testimony was "immaterial".

The first of these propositions was developed by the court with some elaboration. The second was stated as a necessary deduction from the first, but without discussion. Thus it is manifest that the decision sustaining the demurrer was, within the meaning of the act of March 2, 1907, (34 Stat. L. 1246), based upon construction of the statutes upon which the indictment was founded, namely, the desert land laws, in so far as they permit or prohibit assignments before final proof, and section 5392 of the Revised Statutes, denouncing as perjury the wilful giving of false testimony upon "*any material matter*", by any person duly sworn to speak the truth, "before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered", and the amendment of section 2294 of the Revised Statutes (33 Stats., 59) which deals with false swearing before the officials therein authorized to take depositions relating to land entries.

SPECIFICATIONS OF ERROR RELIED ON.

The assignment contains nineteen specifications of error which may be reduced to two, thus:

I.

Error in holding that the false testimony was not "material" within the meaning of the perjury statutes, irrespective of the validity of the assignment of the desert land entry.

II.

Error in holding that the assignment of the desert land entry was invalid.

Either of these specifications, if sustained, calls for a reversal of the judgment and renders unnecessary a decision upon the other. The first is, however, of vastly more importance, since the principles upon which it rests are vitally necessary to an efficient administration of the land department, as well as all other departments of the public service, wherein facts are to be decided upon sworn testimony and the law is to be construed and applied.

The following propositions will be advanced in argument:

ARGUMENT.

I.

The false testimony was "material," whether the assignment was valid or invalid, since

1. It tended strongly to support a claim under the desert land laws which the Land Department had jurisdiction to adjudicate, and

2. Jurisdiction existing to adjudicate the claim which the false testimony supported, such testimony was none the less "material" because allowance of the claim might be erroneous.

II.

The assignment was lawful, because:

1. The desert land law, as amended in 1891, expressly permits assignment after original entry and before final proof.

2. Even if the law be not entirely clear on this point, the doubt should be resolved in favor of assignability; for

There is no express prohibition or evident policy against alienation after entry, and, such being absent, the law, upon general principles, favors the existence of the right;

The contemporaneous and continuous construction of the amended act by the Land Department permits such assignments;

In the proceedings in Congress attending its passage, the act of 1891 was interpreted as intending such assignments, and this intent has been recognized in more recent laws.

These propositions will now be taken up in their order.

I.

THE FALSE TESTIMONY WAS "MATERIAL" WHETHER THE ASSIGNMENT WAS VALID OR INVALID.

The entry was made, in due form, by Boyer, who, some twenty days later, assigned his rights thereunder to Beekler. The latter thereupon filed the instrument

of assignment in the local land office where the entry was pending, and thereupon, *according to the construction of the law by the Land Department, then settled and continuous for at least sixteen years,* became the legal substitute of Boyer, with full right to carry out the entry and obtain a patent in her own name by complying with the conditions as to payments, reclamation and improvements laid down in the statute. If Beekler had done this honestly, without a shadow of doubt she would in due course have obtained a patent.

Section 5 of the act of March 3, 1891, amending the original Desert Land Law of 1877, provides as follows:

> Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: *Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid,* and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. *Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum*

> *of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended,* * * * If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents (per acre) advanced payment shall be forfeited to the United States, and the entry shall be cancelled. * * * 26 Stat., 1095.

The testimony of the defendant was given as part of the first yearly proofs of reclamation etc., required by this section, Hammers being offered by Beekler as one of the "two or more credible witnesses" whom the latter was obliged to produce to sustain her claim in good standing and save it from forfeiture. The deposition was given before the clerk of the superior court of Imperial County, a court of record (Rec. 5, 6), pursuant to the act of March 4, 1904, 33 Stat. 59, amending R. S. 2294 as follows:

> SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits,

proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take such affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. *That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, wilfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury,* and shall be liable to the same pains and penalties as if he had sworn falsely before the register. * * *

The competency of the clerk to administer the oath is expressly averred (Rec., 5, 6), in the way approved by section 5396 of the Revised Statutes, and the indictment shows in addition that, pursuant to the requirement of the act last above quoted, the false deposition was subsequently filed with the register and receiver of the land office at Los Angeles,

where the entry was pending, as part of the entry proceedings (p. 8).

Revised Statutes, section 5392, under which the indictment was returned (see endorsement Rec., 9), is as follows:

> Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

Whether the indictment was properly returnable under this section rather than the last part of section 2294, or both of them, is not a matter of importance. (*Williams* v. *United States*, 168 U. S., 382, 389; *Caha* v. *United States*, 152 U. S., 211, 216.) The laws, being *in pari materia*, and the one referring to the other for the penalty, should be taken together, and it will be observed that the indictment amply sets forth all of the elements of the offense which both together define.

The court below held that the entire affidavit or deposition subscribed and sworn to by the defendant was immaterial, in face of the perfect logical adaptation of the statements therein contained to support the claim in behalf of which the deposition was given. The deduction of immateriality flowed entirely from the finding that the assignment was unlawful. The words of the trial court on this subject are (Rec. 12):

> Defendant contends that the law did not authorize the assignment, and therefore, the affidavit was immaterial; so that the only question presented by the demurrer is whether or not a desert land entry may be assigned before the work of reclamation has been completed.

Having discussed this question and found no authority for the assignment, the court proceeded as of course to set aside the indictment upon the assumption that the matter of the assignee's application lay wholly without the jurisdiction of the Land Department.

1. The false testimony supported a claim under the desert land laws which the Land Department had jurisdiction to adjudicate.

The fallacy of the position of the lower court lies in the assumption (necessarily implied) that the jurisdiction of the Land Department to adjudicate claims to land under the land laws is confined to such as are based upon correct construction of those laws as it may subsequently be declared by the courts. Had there been no assignment, and had the applica-

tion to submit proof of reclamation been made directly by the original entryman, the trial court would have been obliged to hold that the matter was one within the jurisdiction of the Department, that the official before whom, as its *quasi* examiner, the proof was offered, was authorized by a law of the United States to administer the oath, and that the testimony given by the defendant was very material to the subject in hand. So, if the court, in construing the desert-land legislation, had arrived at a different conclusion on the question of assignment, it must necessarily have held that the official was competent to administer the oath, that the laws authorized it, and that the testimony was material. The decision must mean that the whole proceeding was an absolute nullity; that every proceeding before the Land Department concerning a claim not founded upon a correct exposition of the land laws, is equally a nullity; that that Department, while charged with the duty of understanding those laws and administering them rightly, is bereft of all power to make mistakes concerning them, and that every step which it takes looking to the adjudication of a claim not advanced upon a correct theory of the statutes, is absolutely void. The decision means that if the assignee had obtained a patent under the desert-land entry, the patent would be *literally void*—a mere piece of waste paper—because the law, properly interpreted, did not permit the assignment. It means that all of the scores of patents already granted in like cases are similarly void; in fine, that every

patent issued by mistake of law is, legally considered, *nothing.*

The truth is that the principal business of the Land Department consists in the interpretation and application of the land laws, and to receiving and adjudicating the claims submitted under them. It is just as much its duty to reject claims not authorized by law as to allow those which are, and, in order to accomplish this process of separating the sheep from the goats, it is obliged to entertain, examine, and pass upon the several claims, good and bad, as they are presented, and in so doing to exercise jurisdiction. Every one of these claims, until finally passed upon (assuming that it respects land over which the Department has dispository power) is, in a proper sense, a matter within its jurisdiction, and when in fact, by an error of law, it issues a patent for such land, the patent, though voidable, is not by any means a legal nullity.

The claim of the assignee was a claim pending before the Land Department which, according to the settled construction of the desert land law by that department, would have been sustained as valid upon proper proof. In that event the assigned entry would certainly have culminated in a patent of at least *prima facie* validity. The claim was to specific land within the disposing power of the department, was based upon a law under which the land might properly be acquired, and was therefore a claim which the department was obliged to sustain or reject according to its construction of the law

applied to the facts judicially ascertained. So that, even if it could be said (which it can not) that the land department would certainly have rejected this claim on the ground of nonassignability of the entry, it can not be said that the department was without jurisdiction to decide the contrary, sustain the claim on false testimony, and cause to be issued a *prima facie* valid patent to the land. A patent thus issued can not be revoked or recalled by any action of the executive branch of the government. It stands as a cloud upon the title of the United States which only the judiciary, in a direct proceeding brought in the name of the United States, is competent to remove, and which, if allowed to rest unchallenged for six years, would deprive the United States of all title, legal and equitable, to the land which it purports to convey.

Such a patent would not be one which could be said to be void, incapable in any event of effecting a transfer of title. That quality attaches to a patent only when the land which it purports to convey is not lawfully subject to disposition by the Land Department. In such a case the department is without jurisdiction over the subject matter. But the land being subject to disposition by the department, its jurisdiction over the subject matter is complete, and a patent to such land is not not only *prima facie* valid, but impervious to collateral attack, although it may be held to be voidable, in a proper proceeding, for having been erroneously issued.

As Mr. Justice Brown said, delivering the opinion of the court in *Noble* v. *Union River Logging Railroad*, 147 U. S., 165, 174:

> This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent.

In the leading case of *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646, this court, speaking through Mr. Justice Field, said:

> A patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment.
>
> * * * * *
>
> On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.
>
> According to the doctrine thus expressed and the cases cited in its support,—and there are none in conflict with it,—there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a

> patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief.

The principles governing the powers, functions and duties of the Land Department, and the effect of its decrees and of the patents issued thereon have been declared and applied by this court in a multitude of cases. They have been ably summarized by Circuit Judge Sanborn in *King* v. *M'Andrews*, 111 Fed. 860, 863, in language which, omitting the exhaustive citations, is as follows:

> The land department of the United States, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them.
>
> A patent of land within its jurisdiction, issued by the land department, is the judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of that judgment.
>
> When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack.

The test of the jurisdiction of this tribunal is the true answer to the question, had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the land department had jurisdiction of the case, and the patent which evidences its decision conveys the legal title, and is impervious to collateral attack. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it.

Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and the land for the disposition of which Congress has made no provision, is not intrusted to the disposition of the land department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law.

But land which the Department is vested with the power and charged with the duty to hear and decide the claims of applicants for and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong.

> The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions.
>
> The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it.
>
> The aggrieved party has a like remedy for the wrongful issue of a patent upon a misapprehension of the facts, which is induced by fraud or gross mistake.

In *Shepley* v. *Cowan*, 91 U. S., 330, 340, this court said:

> The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions.

In *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, this court expressly held that a claimant under one of the general land laws can not call upon the courts

to determine and declare his alleged title in advance of the adjudication of his claim by the Land Department, upon the theory that by the admitted facts there is nothing which the department could do but declare him to be the owner, as a matter of law. The court said (p. 313):

> The protest by the defendants was duly filed within the time permitted by the regulations of the office, and the questions arising thereunder are, as stated in the bill, still pending before the General Land Office. Whether it was necessary at the time of making the selection for the selector to file in addition to his non-mineral affidavit an affidavit that the land was not occupied in fact, is a question of law for the Land Department to determine among the other questions to be decided by it. Its decision of any legal question would not, of course, be binding on the courts whenever such a question might properly arise in any future litigation. It is also for the Land Department to determine whether, if the land were not known to be mineral land at the time of the selection, the fact that mineral in paying quantities has been found since that time, will vitiate that selection.

Page 315:

> Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts can not take jurisdiction and proceed to decide such question

> themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction can not be taken away from it by the courts.

In *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, the petitioner sought by mandamus to compel the Secretary of the Interior to recall and vacate a decision rejecting certain selections made under the Forest Lieu law, to reinstate the proceedings before the Land Department based thereon, and to issue patents for the land selected in conformity with the law as the petitioner asserted it to be. It appears from the statement of facts in the report that the questions decided by the Secretary adversely to the petitioner were pure questions of law. This court decided that the function of the Secretary thus sought to be controlled was judicial and not ministerial in its nature. The following quotations are from the opinion (pp. 323, 324):

> We have set out in the foregoing statement of facts, at very great length, a large portion of the contents of the petition and answer in this case. It has been done for the purpose of showing by the record itself the questions of law arising therefrom. Upon a perusal of the record it appears that those questions are not merely formal ones nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had

> full and complete jurisdiction over the matter arising under the act of June 4, 1897, and it thereby became the duty of the officers of that department to decide them. * * *
>
> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. * * *
>
> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. *Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was*, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

Conceding however that a patent issued to an assignee of a desert land entry would be void, to the extent that it would not operate to convey the legal title and might be assailed collaterally, the patent would not be a total nullity. It would, at least, be a solemn act of Government which, as has been held by this court, the Executive could not recall, and which the judgment of a court alone could set aside—*United States* v. *Stone*, 2 Wall., 525, 535; *Beley* v.

Naphtaly, 169 U. S., 353, 364; and which "*prima facie passed* the title", Hughes v. United States, 4 Wall., 232, 236.

Its importance would go even beyond this, since by lapse of six years' time, this outstanding "void" instrument would operate to divest the United States of all title to the land.

In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S., 447, the government claimed that the patent sought to be set aside was void, because issued for lands which at the time of issue were reserved for public purposes, and that therefore the statute of limitations (Act of March 3, 1891, ch. 561, sec. 8, 26 Stat., 1099) had no application. This court, however, said, (p. 449):

> There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act," that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. Peter R. R. Co., 165 U. S., 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make

it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to "any patent heretofore issued," it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell* v. *Warren*, 2 Black, 599.

In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren*, 2 Black, 599, 605; *Sharon* v. *Tucker*, 144 U. S., 533; *Davis* v. *Mills*, 194 U. S., 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S., 463, 476.

2. Jurisdiction existing to adjudicate the claim which the false testimony supported, such testimony was none the less "material" because the allowance would have been erroneous.

The assignment under consideration had already been filed in the land office, and, under the rules and decisions of the department, the assignee had a right

to proceed under it. The proof was taken accordingly with the certainty that, if sufficient in substance and properly authenticated, it would be received. The case may be viewed as analogous to a case pending in court which has progressed to an issue of fact upon a bill or declaration revealing on its face the want of a good cause of action, but in which the court has the power to render an effective though reversible judgment. Testimony relevant and material to this issue of fact, would be no less so because the issue had been joined in disregard of the erroneous theory upon which it was tendered. Upon this point the authorities are apparently unanimous.

The case of *Adams* v. *Way*, 32 Conn., 160, illuminates our contention. It was there held that, although the plaintiff's statement of his cause of action was so defective as to be subject to a general demurrer or a motion in arrest of judgment, testimony of facts tending to support the cause of action as stated was not objectionable as immaterial; and the court said:

> "By 'material' in this connection is not meant of legal sufficiency, but whether they constitute a part of the plaintiff's case as he presents it."

So, in *State* v. *Whittemore*, 50 N. H., 245, 248, it was held that "perjury might be committed on the trial though the complaint was bad upon demurrer or motion in arrest of judgment."

In *Stewart* v. *State*, 22 Ohio St., 477, the question was whether perjury could be committed in Ohio in

proceedings to take depositions for use in a divorce case pending in Indiana, in the absence of the facts of residence necessary to exist to maintain jurisdiction in the Indiana court. Held, that it could. The court said (p. 484):

> While the petition is pending, and the question of residence is undetermined, or the fact of residence has been found by the court, surely there is a case or matter pending in which the court is authorized by law to hear testimony and to administer oaths to witnesses. Whether the decree of the court, based upon an erroneous finding of the fact of residence, will be binding upon the parties, and estop them from denying the fact of residence, is entirely another question; it is enough here to know that the laws of Indiana authorize the institution of the proceeding before the fact of residence is established, and give the court power to hear testimony in the case.

In *State* v. *Rowell*, 72 Vt., 28, 15 Am. Cr. Rep., 567, defendant was prosecuted for perjury committed in another criminal trial against himself wherein the indictment had been found to be too bad to support the conviction. It was claimed that, because of this fatal defect, there was, in the former case, "no issue to which the testimony was material." But this claim was overruled. We quote from the opinion:

> The trial court had power to hear and determine the cause and this constituted jurisdiction of the subject matter. *Vaughan* v. *Congdon*, 56 Vt., 111; Perry v. Morse, 57 Vt., 509.

The case, therefore, is entirely different from one where the oath is administered by a person having no legal authority for so doing, as by a person acting merely in a private capacity, or who has authority to administer certain oaths but not the one in question, or by one who has authority seemingly colorable, but which is in fact unwarranted and merely void. In such cases the oath is not perjury, for it is altogether idle. 1 Russ. on Cr. (2 ed.) 520. The case is not different in principle from one where there is a mistrial by reason of error in the admission or rejection of evidence, or in instructions to the jury, or where judgment is arrested by reason of a defect in the declaration, in which cases it could not be seriously contended that false testimony did not constitute the alleged crime.

If the crime of perjury consisted wholly of the wrong done in procuring an unjust verdict, there would be a semblance of reason in claiming that when the verdict was set aside by reason of an insufficient indictment the proceeding was a nullity, and perjury had not been committed. But a wrong verdict, though it may be the result of perjury, is not its essence. All the authorities agree that a prosecution for the offense is not grounded upon the injury or inconvenience which an individual or the public may sustain, but upon the abuse and insult to public justice. (2 Chit. Crim. Law, 157; 7 Bac. Abr. 426.) Accordingly it is held that it is immaterial whether the false oath is credited by the triers of the fact or not, or whether the person

to whose prejudice it was taken is damaged by it or not. Bac. Abr., supra; 2 Bish. New Cr. Law, sec. 1028.

So it has been held that a witness is guilty of perjury who testifies falsely to a material fact, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testifies. *Chamberlain* v. *People*, 23 N. Y., 85; 80 Am. Dec. 255.

It is laid down in 2 Russ. on Cr., 6th ed. 318, that perjury may be committed on the trial of an indictment which is afterwards held bad upon a writ of error, and *R.* v. *Meek*, 9 C. & P. is cited as authority. There it was objected that the evidence of the defendant could not have been material, as the former indictment was held bad upon a writ of error for an insufficient assignment of perjury, but the objection was overruled, the court remarking that it would be rather too much to say, that whether a witness had committed perjury or not, could depend upon the validity in point of form of the indictment as to which he had testified. The ruling sustaining the State's demurrer to the respondent's plea was correct.

In *Chamberlain* v. *People*, 23 N. Y., 85, the plaintiff in error sought to reverse a conviction of perjury, based upon false testimony which he had given in divorce proceedings against his wife. The statute under which he was convicted was practically the same as Revised Statutes section 5392, providing in substance that every person who should wilfully and corruptly swear to "any material matter on any oath, affirmation, or declaration legally administered

in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof" should be deemed guilty of perjury. The false testimony had a direct logical tendency to sustain the action for the divorce but was clearly inadmissible and incompetent because of its character, and for this reason was claimed, in the criminal proceeding, to have been immaterial. This contention, however, was overruled. The court said, (p. 87):

> The testimony offered to be proven was given before an officer of the court in a proceeding in an action, and was a fact tending directly to establish the main issue submitted to the referee, and therefore material * * *
>
> (page 88) Although the testimony inquired after was clearly incompetent and inadmissible in the action in which it was given, still its admission did not render it immaterial. The referee erred in receiving it; but that error did not destroy its materiality. Were it false, perjury could be predicated upon it. It was held in Van Steenbergh v. Kortz (10 J. R. 167), that a party erroneously sworn in his own behalf might be guilty of perjury, especially where the proceedings remained unreversed; and the doctrine of that case was approved in Pratt v. Price (11 Wend., 128).

In *Wood* v. *People*, 59 N. Y., 117, 123, the court said:

> If a person swears falsely in respect to any fact relevant to the issue being tried, then we think he is guilty of perjury, although the case failed from defect of proof of another fact, and

> although the other fact alleged had no existence * * * The evidence would be relevant to the cause, and it does not lie with the perjurer to say that if he had sworn to the truth the case for other reasons would have failed.

That reversible irregularity in the proceedings in which the false testimony was given is no defense to the prosecution for the purjury is clearly held in *Smith* v. *State*, 31 Tex. Cr. App., 315, 20 S. W., 707, where the point of objection was that in the criminal case in which the false swearing was done the jury had not first been sworn, and in State v. Hall, 7 Blackf., 25, where it appeared that in the prior trial but six men were impaneled as jurors, whereas the law required twelve. Other cases of similar effect are:

State v. Wakefield, 73 Mo., 549, 554;

State v. Flagg, 27 Ind., 24, 25;

Cordway v. State, 25 Tex. App., 405; 8 S. W., 670;

State v. Brown, 68 N. H., 200; 38 Atl., 731;

State v. Peters, 107 N. C., 876;

State v. Levalley, 9 Mo., 824, 827;

Kelley v. State (Tex. Cr. App.) 103 S. W., 189;

2 Bishop Cr. L. (8th Ed.) sec. 1030.

> The true test would seem, in reason, to be, whether the evidence could have properly influenced the tribunal. Though by accepted rules of practice it ought to have been rejected, still, if admitted, it must be deemed to have wrought its legitimate results. The ruling of the judge was the law for the moment and the occasion when and upon which the witness

> gave the testimony; therefore, if it was pertinent and false, it should be adjudged perjury. 2 Bishop Cr. L. (7th Ed.) sec. 1036.

It is conceded, of course, as a well settled doctrine of the common law, that testimony wholly immaterial to the issue or matter presented for determination can not, however false, be made the basis of a prosecution for perjury. This rule, it must be said, is technical in the extreme if not actually unwise. (Stephen, General View of the Criminal Law of England, p. 279.) However this may be, it is clear that the doctrine should not be pushed so far as to class as immaterial and innocent, false and corrupt testimony tending logically and directly to sustain any claim presented to an officer or tribunal possessed of jurisdiction to decide concerning it, however limited may be the jurisdiction and however ill founded may be the claim when carefully examined in the full light of the law. The true rule here intends, by the term "material," that which is material to the claim set up for adjudication or allowance, whatever it may be. The test is not whether the testimony tends to prove a claim good in law, but whether it tends to prove any claim or matter in any sense justiciable by the tribunal or officer before whom it comes for decision. Of course, if the matter be wholly without the jurisdiction, it can not be decided at all, and therefore the testimony is said, in a loose way, to be "immaterial," the real objection being, however, not immateriality, but the total want of juristic quality in

the proceeding and hence the total impotence of the testimony to effect any juristic result.

The distinction, as to effect, between false testimony in a proceeding wholly void for lack of jurisdiction and false testimony in a proceeding where the judgment is erroneous and voidable, is well stated by Wharton in 2 Cr. L., (8th ed.) sec. 1272, as follows:

> A suit which is actually void and null for want of jurisdiction or other incurable defect is not one in which perjury can be committed. Thus it is not perjury to swear falsely in a discontinued or abated suit. But if the proceeding is merely voidable, even though there be such defects as require a reversal on error, false swearing in its conduct is perjury, if the false evidence could by any contingency be introduced as testimony.

II.

THE ASSIGNMENT OF THE ENTRY WAS LAWFUL.

1. The desert land laws.

The original desert land act entitled "An Act to provide for the sale of desert lands in certain States and Territories," approved March 3, 1877, ch. 107, (19 Stat. L., 377), is as follows:

> That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district

in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land, if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided*, that no person shall be permitted to enter more than one tract of land and not to

exceed six hundred and forty acres which shall be in compact form.

Section 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

Section 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

(Note: This act was preceded by another, of similar provisions, but applicable only to lands in Lassen County, California, Act of Mar. 3, 1875, ch. 160, 18 Stat. L., 497).

This act of 1877 was amended by section 2 of the act of March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes," ch. 561, 26 Stat. L., 1096; by addition to the earlier act of five new sections, designated as sections 4 to 8, inclusive. These, so far as may be material, are:

Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall ex-

hibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

Sec. 5. That no land shall be patented to any person under this act unless *he or his assignors* shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid: and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improve-

ments during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre; Provided, That proof be further required of the cultivation of one-eighth of the land.

Section 6 saves rights under the prior law, allows them to be perfected thereunder or under this law, and repeals all acts and parts of acts in conflict with this one.

Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the *applicant or his*

assigns; but no person or association of persons shall hold by *assignment or otherwise prior to the issue of patent,* more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act. *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and the moneys paid therefor, shall be forfeited to the United States.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

The following legislation has been enacted since the alleged perjury occurred, viz:

Act of March 26, 1908, ch. 103, 35 Stat. L., 48, "Providing for second desert land entries:"

That any person who prior to the passage of this act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled

> to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert land entry under this act shall furnish the description and date of his former entry; Provided, That the provisions of this act shall not apply to any person whose former entry was *assigned* in whole or in part or cancelled for fraud, or who relinquished the former entry for a valuable consideration.

The Act of March 28, 1908, ch. 112, 35 Stat. L., 52, "Limiting and restricting the right of entry and assignment under the desert land law, and authorizing an extension of time within which to make final proof," provides:

> Sec. 2. That from and after the date of the passage of this Act *no assignment of an entry made under said Acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said* Acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

2. Construction by the Land Department and the Courts.

Prior to the amendment of 1891, the attitude of the Land Department toward assignments before final proof of entries made under the original act was vacillating.

The original instructions of March 12, 1877, provided that the declarant "or his assignees" might

fulfill the conditions and obtain the patent; and this practice was followed until April 15, 1890, when Secretary Schurz reversed it in Downey's Case (2 Copp's L. O., 26), saying:

> I think there can be no doubt that the claims were not assignable. The law by which the entries were allowed to be made treats them as the claims of the party making the entry. If proof is made showing a compliance with law, "a patent for the same shall be issued to him."

His ruling, was, in turn, modified in 1884, by Secretary Teller, to the extent of permitting final proof on entries assigned prior to April 15, 1880, but the patent was directed to issue in the name of the original entryman. *Dole's Case*, 3 L. D., 214. This decision contains a resume of the previous rulings. Secretary Teller there said (p. 215):

> Although I find nothing in the act to warrant so broad a construction of its provisions—especially as it expressly provides that the declarant shall make oath that he intends to reclaim the land and that upon proof of reclamation patent shall issue to him, and as the right of assignment is not directly authorized—yet these instructions had the force of law, and parties had the right to assume that this was the legal construction of the act, and that assignees of such entries would be protected in their purchases and have the rights of entrymen. I think it immaterial that the construction was erro-

> neous and unwarranted, so long as it was the official announcement of the law by the Land Department.

As to all assignments made subsequently to the ruling of Mr. Schurz, April 15, 1880, the Department maintained steadily an adverse attitude until the act was amended. See *Gasquet* v. *Butler's Heirs*, 27 L. D., 721, 722; *Arnold* v. *Christy* (Sup. Ct. of Arizona, 1893), 33 Pac., 619.

Coming now to the amendments of March 3, 1891, we find the Land Department recognizing, almost immediately, the assignability of desert entries, in the following paragraph of instructions concerning this act, issued to registers and receivers, under date of April 27, 1891, by the Commissioner of the General Land Office with the approval of the Secretary of the Interior:

> Assignments are recognized, but the amount of land that may be held by assignment or otherwise, prior to issue of patent is restricted to 320 acres by the seventh section, which section it is provided, however, shall not apply to entries made prior to the act. Assignees must properly prove their assignments by filing in the local office an affidavit and certified copy of the instrument under which they claim, and must make affidavit of the amount of land held.

The same day the Secretary ruled, however, that the assignee, as well as the original entryman, must (under section 8 of the act) be a resident of the state

or territory wherein the land was situate, and must show this on final proof.

Instructions, 14 L. D., 565.

By instructions to registers and receivers, dated January 26, 1894, approved by Secretary Hoke Smith, attention was specially directed to the requirement that the assignee must possess the qualifications of the original applicant in the matter of citizenship and residence. 18 L. D., 31.

January 22, 1895, Secretary Smith, in reversing this requirement as to residence, and in holding that the word "entry" in section 8 refers to the original filing, and not the final proof, said:

> Congress contemplated an assignment of these desert land entries. The object of making this class of entries an exception to the unvarying rule—except as to coal entries—can be readily understood. It is a matter of common knowledge that the effecting of a thorough or sufficient reclamation of desert lands in many instances involves the erection of permanent dams or reservoirs for the purpose of storing the water in the season when at flood, and the construction of canals for carrying the water many miles in length. From these canals lateral ditches must be run to the particular tracts to be irrigated. All this means permanent structures on exact grades to prevent washing; headgates wherever the lateral ditches leave the main canal, constructed accurately to avoid waste, and so that the quantity of water required may be exactly measured. It is needless to say, perhaps, that all this re-

quires a greater amount of capital ofttimes than can be furnished by the residents in the desert country. To induce those of our people who have the money to further these great enterprises, Congress wisely provided that these desert entries might be transferred under certain limitations and restrictions so that the assignees who have invested capital in the construction of these waterways might be assured of some compensation for their outlay. If the construction heretofore placed on this act is to prevail, that the assigns must also be resident citizens of the State or Territory where the land is located, it might defeat the object Congress had in view.

Re Kimball, 20 L. D., 67, 70.

In *Gasquet* v. *Butler's Heirs* (Dec. 29, 1898), 27 L. D., 721, it was held that an entry made under the old law and assigned after the act of 1891, could be proved up under the latter. We quote from page 722:

> The matter of the said assignment, however, should perhaps receive brief consideration herein. Desert land entries controlled by the provisions of the Act of 1877, supra, have been uniformly held to be non-assignable ever since the decision of April 15, 1880, in the Downey Case (7 C. L. O., 26), and to be vitiated and rendered subject to cancellation by attempted assignment (David B. Dole, 3 L. D., 214; Henry W. Fuss, 5 L. D., 167; Circular Instructions of June 27, 1887, ibid., 708; and Haggin v. Doherty, 14 L. D., 123). The Act of March 3, 1891, supra, entitled "An Act to repeal timber culture laws, and for other pur-

poses," added five sections, numbered from four to eight inclusive, to the desert land act of 1877. By section seven of these amendatory sections authority is expressly given to issue patent "to the applicant or his assigns," but it is further declared therein that "this section shall not apply to entries made or initiated prior to the approval of this act." This is, however, not the only provision of the amendatory act authorizing or recognizing assignments of desert land entries, because section five of these added sections also plainly contemplates that assignments may be made of desert land entries during the period allowed for the reclamation and improvement of the lands embraced therein.

Without section seven the preceding amendatory sections of the act of 1891 would undoubtedly be held to contain sufficient authority for assignments thereafter, notwithstanding the entry was made or initiated previously, provided it was perfected under that act instead of the act of 1877 alone. Would it not be a violent construction to hold that after recognizing, and in effect approving such assignments in sections five and six, Congress intended in section seven to forbid them except in cases where the entry was made subsequent to March 3, 1891? Section seven contains several provisions in addition to that relative to assignments, and it does not follow that in declaring, generally, that these shall not apply to entries already made or initiated, that it was the intention of Congress to infringe upon or limit in any way the provisions of the

preceding sections applicable to such entries. The prohibitive words are confined, in terms, to the provisions of that section, and, it is believed, do not reach or control, by necessary implication, the provisions of the preceding sections relative to assignments.

Other departmental decisions evidencing the settled construction in favor of assignment, may be referred to briefly.

A corporation organized under the laws of the State is in contemplation of law a citizen of the United States, and, as such, can take and hold by assignment a desert entry.

Nevada Southern Ry. Co., decided December 28, 1895, 22 L. D., 1.

While a desert land entry made in accordance with the law, may be fully assigned, the right to make such an entry is not assignable.

T. C. Power & Bro., 33 L. D., 152, 154, decided June 30, 1904.

In the case of absolute assignments of such entries, the assignee assumes the position of an original entryman, so far as his qualification to take is concerned, and he being the person then charged with the submission of satisfactory proof of compliance with the law, is before the land department in his own right and all future transactions respecting the entry are conducted directly with him.

Herbert C. Oakley, 34 L. D., 383, 396, decided January 15, 1906.

The assignee of a desert land entryman, who for all purposes is the successor of the entryman, must be held to be entitled to the

same rights and privileges with respect to the entry that the entryman might have been entitled to in the absence of an assignment.

Campbell v. Glover et al., 35 L. D., 474, 477, decided March 20, 1907.

See also Ida Lundquist, 37 L. D., 149–150, decided September 8, 1908; Thomas E. Jeremy, 25 L. D., 375, 376; Ellingston v. Aitken, 30 L. D., 71, 73.

3. The act as amended in 1891, though permitting assignments after entry, does not countenance the making of entries with the intention to assign, or with any other intention than that of reclaiming the land.

This important distinction, whatever its bearing upon the argument which follows concerning assignability *after* entry, can not be too strongly insisted upon, in order both to prevent a misunderstanding of the government's position concerning it, and to insure for the statutes in question a construction which, while rendering them liberal toward their intended beneficiaries and effective of the purposes which they were designed to accomplish, shall save them from becoming the means whereby unscrupulous speculators may engross large portions of the public domain and practice extortion upon deserving persons who would acquire land by honest performance of the statutory conditions.

The law of 1877 (sec. 1) provides that upon making his entry the entryman shall declare on oath that "*he intends to reclaim*" *the land* "*by conducting water upon it.*" This requirement has never been relaxed. The amendatory acts do not alter it in the slightest degree.

And there is ample reason why this should not be done. The purpose of the statute, originally and now, was not and is not limited to the mere reclamation of desert lands. The idea of reclamation went hand in hand with the idea of settling up the regions affected by worthy and industrious citizens. The proceedings attending the passage of the act of 1877 in the House of Representatives show this.

The following is from the report of the Committee on Public Lands recommending to the Senate the passage of the bill as it came from the House:

> It has been suggested that these lands be sold in large quantities in order to induce private capital to undertake the work of their reclamation. Your committee fear that any system of sale whereby the title would pass before irrigation would encourage speculation without inducing settlement. The bill provides for the sale of a section of land to any person who will first irrigate the same, at the usual price of $1.25 an acre. A more liberal policy has been suggested of granting lands, after irrigation, without any money consideration. But the committee believe that when these lands are irrigated they will be of sufficient value to enable the purchaser to pay the Government price paid for other public lands. Besides, the quantity allowed will be an additional inducement to settlers to undertake the work of irrigation. At all events, it will be time enough to make donations of these lands when it is ascertained that settlers are unwilling to purchase them. It is believed that

> by far the larger portion of the lands bordering on the streams, where sufficient moisture exists for cultivation and where irrigation is cheap and easy, have been appropriated; but the provisions of this bill will enable settlers by combined effort to construct more extensive works and reclaim a class of lands that are now absolutely worthless. The committee recommend the bill with more confidence than they would be willing to express if its principles were entirely new.

For the full report and the lengthy debate which followed, see Cong. Rec., 44th Cong., 2d Session, Vol. V, Part 3, pp. 1964 et seq., 2102, 2156, 2225.

It is manifest that neither the purpose of reclamation nor the attendant purpose of settlement would be promoted by permitting lands to be filed on by mere speculators who might hold them for three years, (under the original act), or one year, (under the amended act), without the doing of a single thing toward the reclamation. Such speculative filings, whereby men who are often little better than parasites acquire a hold upon valuable property for the sole purpose of exacting a price from others really desirous of fulfilling the statutory condition, have been so disgracefully numerous under other laws, notably those relating to acquisitions of rights of way, reservoir sites, and water appropriations and even under the general mining laws, as strongly to suggest that any statutory construction which permits of this form of abuse should be avoided if possible. In the lengthy brief which has been tendered to the court in

this case by counsel representing Chaplin and others, convicted in California for conspiracy to bring about speculative desert land entries in fraud of the statute, an elaborate argument is made to show that since under the act of 1891 entries *already made* are assignable, an entry may be *initiated* thereunder with speculative intent. Counsel reason that if the making of the entry brings with it the right of assignment, the entry may be made with intent and for the purpose of exercising that right. This is a palpable *non sequitur*. The statute in so many words requires that the entryman when filing his initial declaration, shall intend himself to accomplish the reclamation. This is one of the most important features which the statute contains. It is the means whereby the law seeks to select the persons who are most likely to realize its objects, and excludes the speculative go-between. If the statute read as these counsel would construe it, it would be a standing invitation to speculators. The conferring of the right of assignment upon one who has already passed the test by making his entry in good faith with the requisite intention evinces no legislative purpose to encourage speculation, but, rather the extension of a privilege to one who has shown himself worthy of it by proving that he is not a speculator—a privilege which he is likely to prefer not to exercise, but the need of which may come to him by stress of circumstances.

The Land Department has consistently held that entries with speculative intent are not permitted by the statute and this construction should be upheld;

4 L. D., 445; 7 L. D., 337; Id., 378; Circular of June 27, 1887, Reg. 4, 5 L. D., 708, 709. The court decisions are in harmony with this construction.

In *United States* v. *Mackintosh*, 85 Fed., 333, 338, the Circuit Court of Appeals for the Eighth Circuit held:

> There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, *when perfected*, for the benefit of even a corporation, *when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation*. In such case, if the patent be issued to her, she could transfer to whom she pleased. As said by Mr. Justice Brewer, in *U. S.* v. *Budd*, 144 U. S., 163, 12 Sup. Ct., 577:
>
> "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation * * * If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied."

In *Salina Stock Co.* v. *United States*, 85 Fed., 339, decided by the same court on the same day, the acquisition of lands by individuals, nominally for themselves, in reality for a corporation, was denounced as a defiance of the statute and a fraud upon the United States. The case showed a clear instance of "dummy" entries, and the correctness of the decision can not be questioned.

In *Arnold* v. *Christy* (Arizona, 1893), 33 Pac., 619, the court upheld as valid an agreement by Christy, the entryman, with Arnold, providing in terms, that Christy *would at his own expense procure patent* to the land, *and then convey to Arnold* for fourteen thousand dollars, Arnold paying Christy a part of that price down, to be returned to him should Christy fail to obtain final papers and make the deed. The court distinguished between this kind of an agreement and an assignment of the entry itself, saying:

> We know of no ruling of the land department holding that one who has entered desert lands in good faith may not make an agreement to convey the land after title shall vest in him. On the contrary, the land department has affirmatively recognized such agreement as valid, and as not affecting the rights of the entryman to obtain title. In the case of Lanktree v. Vibrans, decided by Commissioner Sparks, and reported in 13 Copp, Landowner, 220, of January 1, 1887, it was held that such an agreement was not an assignment of the entry, and not prohibited by any ruling of the department. We are unable to see wherein the contract in question, by its terms, contemplated any violation of any of the provisions of the desert land laws as to the requirement necessary to obtain title, or restricting the quantity of land which may be acquired by any one person under it, nor any violation of any ruling of the land department which has the effect of law.

4. A fair construction of the amended act leaves little doubt that the right to assign after entry and before final proof is recognized.

The particular clauses of the act as amended in 1891, which expressly refer to assignments, are these:

> Sec. 5. That no land shall be patented to any person under this act unless he, *or his assignors* shall have expended in the necessary irrigation . . . at least three dollars per acre, etc.
>
> Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof . . . and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor *to the applicant, or his assigns;* but no person, or association of persons shall hold, *by assignment or otherwise*, prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands.

Without question the words "assignors," "assigns" and "assignment" relate to the same thing and are used in a single sense. They have been interpreted by the trial court as referring to "transfers" of that full equitable estate, which can only be acquired by complete performance of all the requirements of the act, including final proof, and final payment of the purchase money. The only other interpretation relates to the right, short of equitable ownership, which an entryman acquires by virtue of

partial compliance with the act—that is, the right to pursue the proceeding to final proof and patent, retaining meanwhile the possession of the land, and the benefit of all that has previously been done toward performance of the statutory requirements. There are obvious reasons why the latter should be adopted as the correct interpretation.

A. In the first place the terms "assignor" and "assignment," are technically appropriate when referred to the entryman's *right*, as it exists prior to final proof and payment, but decidedly less appropriate when applied to the *equitable ownership* which he acquires by fulfilling every condition.

The term as commonly, if not almost invariably, used, seems to imply a transfer of some right or interest in a subject-matter in which a third person, not necessarily a party to the transaction, is also interested. Thus it is proper to speak of an assignment by A to B of a cause of action against C or, a general assignment by A to B as a trustee for the benefit of A's creditor, or of an assignment by A to B of a term of years held by the former by demise of C, the owner of the fee. When, however, we have in mind an out and out transfer of the legal or equitable fee in land, it is technically correct to speak of the transaction as a conveyance, and incorrect, or certainly not usual, to denominate it an "assignment."

In *Interstate Land Company* v. *Maxwell Land Grant Co.*, 41 Fed., 275, 279 (affirmed 139 U. S.,

569), Judge Brewer, in construing the verb "assign" in a Mexican empresario contract, said:

> Now, the word "assign" may mean "convey", although it is not the ordinary word used in respect to land transfers.

The word was there held to imply not a conveyance but a setting apart of the land.

> The words "transfer" and "assign" are not the usual operative words of a conveyance of real estate. Sanders v. Ransom, 20 So., 530, 531.
>
> "Convey" is apt to pass realty, and "assign" is used in the disposition of personalty. Story v. Palmer et al., 18 Atl., 363, 365.

In *Cowles & Co.* v. *Rickert*, 1 Iowa, 582, 585, the court says:

> The common law definition of an assignment is, "the transferring and setting over to another, of some right, title or interest in things, in which a third person, not a party to the assignment, has a concern and interest". 1 Bac. Abr., 329.
>
> In 1 Devlin, Deeds, sec. 20., it is said:
>
> In common language this term signifies the transfer of all kinds of property, real, personal and mixed, and whether the same be in possession or in action—as a general assignment—In a more technical sense, however, it is usually applied to the transfer of a term of years; but it is more particularly used to signify a transfer of some particular estate or interest in land.

In Franklin v. Kelley 2 Neb., 79, 88, the Supreme Court of Nebraska construing the provision of the Preemption Act that "All assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void," observed:

> There is a manifest inaptness in this language to describe a conveyance with covenants for title and with warranty, purporting to pass the fee-simple of lands and tenements. I know no other place, in law-books or law-writings, where such a conveyance is spoken of as an assignment or a transfer. Those words may have the large meaning here sought to be placed upon them; but it is very unusual. These terms are used more usually—indeed always, so far as I remember—when applied technically to describe a transfer of an estate for years, or an equitable interest, or a chattel; and this seems to be the use of it here when taken in connection with the word "right,"—a word never employed when speaking of a fee in lands, or even an estate less than a fee in lands.

B. The Court's interpretation renders the words "assigns" and "assignors" practically useless. The equitable fee acquired by full compliance with the law imports complete beneficial ownership, with unrestricted *jus disponendi*. When the patent is earned, it is practically issued. The land ceases to be a part of the public domain, and is subject to be alienated

and taxed as other lands are. So the court has held in many cases.

> Carroll v. Safford, 3 How., 461;
> Witherspoon v. Duncan, 4 Wall., 210;
> Myers v. Croft, 13 Wall., 291;
> Quinby v. Conlan, 104 U. S., 420, 427;
> Stark v. Starrs, 6 Wall., 402, 419;
> Wirth v. Branson, 98 U. S., 118;
> Deffeback v. Hawke, 115 U. S., 392, 405;
> Benson Min. & Smelting Co. v. Alta Co., 145 U. S., 428.

In *Witherspoon* v. *Duncan*, *supra*, the Court, affirming the doctrine as fully explained in Carroll v. Safford, *supra*, held that lands, when finally entered, are subject to state taxation, although through delay of the patent, the barren legal title is still in the United States, saying (p. 218):

> In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property . . . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who holds the equitable title.

This was held of an entry under an act giving the right to enter lands to settlers who were ousted of

possession of others through a treaty with the Cherokees.

In *Carroll* v. *Safford, supra,* the court said of pre-empted land (p. 460):

> When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate-holder and the patentee.
>
> It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty. Now, why can not such property be taxed by its proper denomination as real estate?

In *Quinby* v. *Conlan, supra,* this court through Mr. Justice Field, said (p. 422):

> The general preemption law declares that all transfers and assignments of rights thus obtained prior to the issuing of the patent shall be null and void. This court held—looking at the purpose of the prohibition—that it did not

> forbid the sale of the land after the entry was effected, that is, after the right to a patent had become vested, but did apply to all prior transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated. Myers v. Croft, 13 Wall., 291.

In *Stark* v. *Starrs, supra,* the Court said of land finally entered under the "Oregon Donation Act" (p. 418):

> The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued.

Section 2324 of the Revised Statutes provides, among other things, respecting mining claims:

> On each claim located after the tenth day of May, eighteen hundred and seventy-two, *and until a patent has issued therefor,* not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, ... and upon failure to comply with these conditions, the claim or mine . . . shall be open to relocation, etc.

In the Benson Mining Company's case, *supra,* it was held that notwithstanding the words italicized, when the price of a mining claim has been paid to the government, the equitable rights of the purchaser

are complete, there is no obligation on his part to do further annual work in order to obtain a patent, and an attempted relocation by another is void. This Court said, (p. 432):

> It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership.

nd p. 434:

> There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him.

See, also, *Lessee of French* v. *Spencer*, 21 How., 228, and other cases cited and commented upon in the Benson Mining Company case.

In *United States* v. *Detroit Timber Company*, 200 U. S., 321, this Court said (p. 337):

> The receipt is an acknowledgment by the government that it has received full pay for the land, that it holds the legal title in trust for the entryman and will in due course issue to him a patent. He is the equitable owner of the land. It becomes subject to state taxation, and under the control of the state laws in respect to conveyances, inheritances, etc.,

citing many previous cases.

The trial court did not ignore this principle for the opinion says (R. 14):

> Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government (Myers v. Croft, 13 Wall., 291; Deffeback v. Hawke, 115 U. S., 392, 405; U. S. v. Freyburg, 32 Fed., 195; Smith v. Ewing, 23 Fed., 741, 744). This qualified power of alienation has never, so far as I know, been denied by any court, and the sections above quoted do nothing more than import its recognition.

C. Again, the trial court's interpretation of the words "assigns," "assignors" and "assignment" involves an unreasonable restriction upon the right to dispose of the equitable fee. Section 7 provides that:

> No person shall hold by assignment or otherwise, *prior to the issue of patent* more than

three hundred and twenty acres of desert lands.

Reading "conveyance" for "assignment," and taking the words "prior to the issue of patent" literally, as the trial court has done, is to incorporate into the act a partial but very material, restraint upon the right to alienate the equitable fee. Why should A, who, having performed every condition and paid every dollar, has gained the final certificate, and, under the doctrine of the authorities we have just considered, is, in the eye of equity, the patentee, be prohibited from selling to his next neighbor B—the very person, perhaps, who would be most likely to desire the land—simply because B is the owner of similar lands mediately or immediately under a like entry? And why should B, under such circumstances, be forbidden to make the purchase? Why should the mere delay in the issuance of patent, a delay beyond the entryman's control and which may be seriously protracted, be ordained to produce these hardships?

These questions were asked and answered in cases which have been cited above. The words "prior to the issue of patent" mean prior to the time when the right to a patent becomes vested and fixed.

So in *Myers* v. *Croft*, 13 Wall., 291, it was held that preempted lands when entered might be freely conveyed, despite the declaration in the act that "all assignments and transfers of the right hereby se-

cured, *prior to the issuing of the patent* shall be null and void". The court said (p. 296):

> The inquiry is, what did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the preemption rights? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and independently of the legislation of Congress assignable. The object of Congress was attained when the preemptor went, with clean hands to the land office and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new States, admitted since 1841, have been taken up under the preemption laws, and the right to sell them freely exercised after the claim was

> proved up, the land paid for, and the certificate of entry received. *In view of these facts we cannot suppose, in the absence of an expres declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the government should choose to issue the patent.*

And in the Benson Mining Company's case, *supra*, where the statutory language construed would, if taken literally, have rendered the mining land entered subject to relocation, the court adopted the view of the Secretary of the Interior in the case of *American Hill Quartz mine* (Seckel's Min. Law & Dec., 377 & 385; Copp's U. S. Mineral Lands, 254), that "the full equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued"; and that the delay in issuing a patent being a matter attributable to the administration of the Land Department, the words "until a patent has issued" should not be taken literally,

D. Under this legislation the government offers, to the actual intending citizen, a maximum of three hundred and twenty acres of desert land, devoid of timber and minerals, and incapable, in its natural state, of producing any agricultural crop. To this offer, however, are attached onerous conditions. The person who accepts shall pay down in advance a sum equal to twenty-five cents for each acre entered. He must prepare and exhibit a plan of irrigation "sufficient to

thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops." Thereafter, during each successive year, for three years, he must both make and prove the *bona fide* expenditure of one dollar per acre in "necessary irrigation and cultivation" of the land "by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same." In the end, also, and before he is entitled to a patent, he must accomplish and prove actual cultivation of one-eighth of the tract, and pay an additional dollar for each acre by way of final purchase. And time is of the essence of the contract; for although three years are allowed for the work of reclamation, and a fourth within which to submit the final proof and make the final payment, it is provided (sec. 5) that if the annual improvements are not made and the proofs filed each year "*the lands shall revert to the United States*, and the twenty-five cents advanced payment *shall be forfeited* to the United States, and *the entry shall be cancelled.*"

The Interior Department construes the statute as requiring the acquisition of water-rights, and the construction of a system of ditches, adequate for the irrigation of all of the irrigable land in the tract selected, and proof of this and of the actual irrigation of all such irrigable land, before a final entry may be permitted. (See Regulations approved Nov. 20, 1908.) It is plain to any one at all familiar with conditions in the Arid West, that the expense of meeting these requirements may, and often will, be vastly in

excess of the outlay of three dollars per acre expressly mentioned in the act.

The work involved is not the work of a day; and the man who undertakes it with the best of prospects, may, by failing health or other change of condition, find himself unable to complete the task. Or he may die when the thing stands all but accomplished. Denial of the right of the entryman to assign to another qualified person or the right of his heirs to succeed by descent to his status before the Land Department, would work a great injustice without accomplishing the slightest good.

E. The true rule is that valuable property rights conferred by and earned from the government are accompanied by the right of assignment, unless there be some statutory prohibition, or evident policy, to the contrary. The law discourages restraint on alienation.

a— In Beley v. Naphtaly, 169 U. S., 353, 363, the Court, in upholding the validity of an assignment of a right to purchase lands under the act of July 23, 1866, ch. 219, "to quiet land titles in California," said:

> In Threadgill v. Pintard, 12 How., 24, the court recognized the right of an individual in possession of land and who was entitled to a preemption right therein to convey such right to another.
>
> In Webster v. Luther, 163 U. S., 331, it was held that persons entitled under the Revised Statutes, section 2304, to enter a homestead, who may have theretofore entered under the homestead laws a quantity of land less than 160

acres, and who had the right under section 2306 to make an additional entry for the deficiency, could transfer such right by a proper conveyance.

In the above cases the general rule of law which discourages all restraints upon alienation was recognized, and the assignment of a right before entry was held valid, one of the reasons for such holding being that there was no restriction against such assignment contained in the act creating the right. Nor is any such restriction to be found in the act of 1866.

See also *Myers* v. *Croft*, 13 Wall., 291, 296.

The "Act to Encourage the Growth of Timber on the Western Prairies," as amended June 14, 1878 (20 Stat., 113), required the entryman to state under oath in his initial application that the entry was made for the cultivation of timber for the exclusive use and benefit of the applicant, and that the application was in good faith, not for speculation, nor directly or indirectly for the use or benefit of any other person or persons whomsoever; and that it was the intention of the affiant to hold and cultivate the land and to comply with the provisions of the act. Eight years must elapse during which trees must be planted and cultivated; and if at the end of that period, the person making the entry, or, in the event of his death, his heir or legal representative, proved by two witnesses that the terms of the act had been complied with, a patent was to issue.

In *Adams* v. *Church*, 193 U. S., 510, this court upheld a contract of an entryman, made after initial but

before final entry under that statute, to convey an interest in the land to another after title from the government should be acquired. The court found no objection either to an outright disposition of his holding, or to an agreement requiring the entryman to prove up and convey afterwards. The opinion points out the clear distinction between the policy evidenced by the Homestead Act (*Anderson* v. *Carkins*, 135 U. S., 483), which aims to create homes, grants lands for that purpose, and positively forbids alienation prior to final proof, and the timber culture act, the main purpose of which was to supply trees to "the prairies theretofore barren of timber"; we quote the following:

> There is no requirement in the latter act that the entryman shall make oath that he has not alienated any interest in the land. The policy of the government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the Timber Culture Act if it was intended to extend the principle to that statute. . . . .
>
> If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and

forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. Myers *v.* Croft, 13 Wall., 291.

To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.

The Timber and Stone Act (20 Stat., 89), requires in the initial sworn application a statement that the applicant does not apply to purchase the land on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title when acquired shall inure, in whole or in part, to the benefit of any person except himself.

No similar assurance is required at the final proof, which may be made sixty days later.

In *Williamson* v. *United States*, 207 U. S., 425, 458, it was held that the placing of this requirement at the beginning, and its omission at the end, of the entry proceedings, was clear evidence that Congress had no intention of forbidding the entryman to contract *ad interim* for the conveyance of the land after title acquired. *Biggs* v. *United States*, 211 U. S., 507, 519.

See, also, *Phillips* v. *Carter*, 135 Cal., 604; *Rose v. Lumber Co.*, 73 Id., 385.

b. There is no express prohibition in the law under consideration. There is restriction in confining the benefits, as all the general land laws do, to citizens, actual or prospective. And there is restriction in limiting the quantity of land which may be acquired under the law. Only one tract may be entered by any one person, (sec. 1), and no person may "hold, by assignment or otherwise prior to the issue of patent" (i. e., prior to final proof) more than three hundred and twenty acres (sec. 7). The statute also exacts of the applicant, at the very beginning, an assurance on oath that he himself intends to accomplish the reclamation (sec. 1).

This exaction (quite similar to the requirements of the Timber Culture Law, considered in Adams v. Church, *supra*) forbids one person to file as a speculator or as the secret agent of another, and thereby operates to select for the work of reclamation those who are most likely to accomplish it, while also serving to prevent the holding of land for speculative or dishonest purposes. But all these things are consistent with a transfer by one qualified person, who has made a preliminary entry in good faith, to another qualified person, who receives it with an honest intention to complete the reclamation of the land. This robs no citizen of his equal opportunity, but subserves the main object of reclaiming desert lands.

In *Phillips* v. *Carter*, 135 Cal., 604, where it was held that the right of one who, under the original act had

fully reclaimed the land, was "assignable," and upon his death passed under a devise to his widow, who in turn was authorized to "assign" to another, the court said, (p. 606):

> There is nothing in the Desert Land Act of 1877, nor in the act of March 3, 1891, amendatory thereof, which either in terms or by express implication prohibits assignments; and while it is true that in construing the acts of the government, and of the grants depending thereon, the rule of construction is that most favorable to the grantor, yet the highest tribunal of the country, and the court of last resort for the construction of such acts, has uniformly held that this rule does not impose such a limitation upon ownership, unless by express provision, or by necessary implication, the law must be so read.

5. *The construction of the amended act by the Land Department should be adopted.*

From 1891 until the present time the Land Department has construed the amended act as permitting assignments. Its rules and practice directed the assignee to file his assignment in the land office, and carry on the proceeding thenceforth in his own name; and, accordingly, large acreages, now valuable by dint of heavy expenditures and much labor, have been patented directly to assignees, upon records revealing the assignments upon their face.

If the considerations which have heretofore been advanced go to the extent of raising a reasonable doubt concerning the meaning of the amended law,

that construction which has been so long and continuously adopted and acted upon by the Department should be accepted here. Such is the well settled doctrine of this court.

In *United States* v. *Moore*, 95 U. S., 760, 763, this court said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. Edwards v. Darby, 12 Wheat., 210; United States v. The State Bank of Nor. Car., 6 Pet., 29; United States v. MacDaniel, 7 Id., 1.

In *Shell* v. *Fauche*, 138 U. S., 562, 572, it was declared through Mr. Justice Brewer:

> In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.

To the same point are:

> *Brown* v. *United States*, 113 U. S., 568, 571; *United States* v. *Johnston*, 124 U. S., 236, 253; *Railroad Co.* v. *Whitney*, 132 U. S., 357, 366; *Midway Co.* v. *Eaton*, 183 U. S., 602, 609; *McMichael* v. *Murphy*, 197 U. S., 304, 312; *United States* v. *Hermanos y Compania*, 209 U. S., 337, 339.

6. Construction by Congress.

The bill which, when enacted, became the act of March 3, 1891, was reported to the House by Mr.

Payson, of Illinois, who had it in charge. The feature now under consideration was explained as follows:

> Mr. Stone, of Missouri. I desire to ask the gentleman from Illinois what limitation, if any, is fixed by this conference bill on the right to assign desert-land entries.
>
> Mr. Payson. The provision in the bill is that there shall not be any assignment whatever, so that any one person shall acquire in any way more than 320 acres.
>
> Mr. Holman. There is provision for assignment, but not to an amount more than 320 acres. (22 Cong. Rec., Pt. 4, p. 3614.)

Upon the propriety of considering these remarks, in determining the meaning of the act, see *Jennison* v. *Kirk*, 98 U. S., 453, 459, 460; *Blake* v. *Nat. Banks*, 90 U. S., 307, 317; *Houghton* v. *Payne*, 194 U. S., 88, 101, in Justice Harlan's dissenting opinion; *Binns* v. *United States*, 194 U. S., 486.

That Congress was cognizant of and approved the departmental construction is shown by the act of March 26, 1908, (35 Stat., 48), providing for second desert land entries, which contains the following proviso:

> That the provisions of this act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration,

and is more clearly shown by the act of March 28, 1908 (35 Stat., 52), by which it was declared in section two thereof:

> That from and after the date of the passage of this Act no assignment of an entry made under said Acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said Acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

It is proper to consider this legislation, in *pari materia* with the earlier acts concerning desert land entries.

United States v. *Freeman*, 3 How., 526, 564.

It is respectfully submitted that the judgment of the court below should be reversed.

ERNEST KNAEBEL,
Attorney in Charge of Public Lands Division,
Dep't of Justice.

April, 1911.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
WILLIAM B. HAMMERS.
No. 314.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the supplemental brief filed by the defendant the jurisdiction of the Land Department to pass upon the assignee's claim to the land is not denied. It is insisted, however, that defendant's evidence was immaterial because the statute does not permit any evidence to be produced in support of an assigned claim. As the jurisdiction and duty to pass upon the claim are conceded, it may be questioned whether the defendant is not legally as well as morally estopped to make this contention, especially in the light of the long established practice of the Department to patent such claims, and in view of the allegation in the indictment that the false testimony was given "for the purpose of thereby enabling the said" assignee "to secure patent and title to said land from

the United States." *Ingraham v. United States*, 155 U. S., 434, 437. It is not necessary, however, to pursue this thought; for while the argument put forward by defendant may possess some specious force, reflection upon its hypertechnical character and the serious consequences to which it would lead, should result in its prompt rejection.

The statute which authorized the oath and the testimony (Original Br., p. 8,) applies by its terms to "all proofs, affidavits and oaths *of any kind whatsoever* required to be made *by applicants and entrymen*" under the desert land and other specified laws, and declares that "*any witness* making such proof" who swears falsely and corruptly "to *any material matter* contained in said proofs" "shall be deemed guilty of perjury" and punished accordingly. The purpose of the penal provision was obviously not merely to protect the official dignity of the various officials who were authorized to swear witnesses, etc., but to save the Land Department from being imposed upon and the Government from being swindled by false representations under oath. That purpose would be but imperfectly subserved were the punitive clause to be restricted to cases in which the claimants who produced the witnesses were clearly within their legal rights. A claim may be unlawful for various reasons. It may, for instance, be openly and honestly founded upon an erroneous theory of the law; or it may be fair on its face and inherently bad because of fraud. In neither case can it be said that supporting proofs are invited by the law. In the latter case their

production would be, indeed, an aggravation of the fraud, and positively against the law. Yet, in the sense of this statute, they would be in both such cases, proofs "required to be made"; for the statute of course has reference here to the proofs required to sustain the particular claim or entry, and not to the legality or illegality, *bona fides* or *mala fides*, of the claim itself.

But we do not rest our position upon the special phraseology of the act of 1904, nor shall we here attempt any fine drawn analysis of the words of the act of 1891. It is plain that under the latter the testimony given by Hammers (aside from its falsity) was in character, time and occasion precisely what was required to uphold the entry and carry it on toward patent; and it is equally plain that whoever was entitled to claim and perfect the entry was entitled to adduce the testimony. Consequently, if the Land Department had a jurisdiction to countenance the assigned claim, it must have had a jurisdiction to receive, act upon and be influenced by the testimony. It follows that there would be the same duty to exact an oath from the witness and the same authority to administer it to him, whether the claim were original or assigned; for the only purpose of the statute in requiring the oath is to insure that the proof of reclamation and improvement shall be trustworthy.

The authorities cited in defendant's supplemental brief are inapplicable.

In *Williamson's Case* (207 U. S., 425), it was held that applicants under the Timber and Stone Act may

lawfully contract to convey provided this be first done after application though before final proof; from which it necessarily followed that statements in the final proofs in effect denying the existence of such agreements were immaterial. The other citations are either of cases in which the court held that the testimony did not tend to prove any fact which the law in any event required to be proven and was hence, in the proper sense, immaterial, or cases in which there was a positive statutory prohibition against the witness.

Advantage is taken of this opportunity to call to the attention of the court a clear cut decision by the Circuit Court of Appeals for the Eighth Circuit which was, unfortunately, overlooked in the preparation of the original brief, and which sustains in the most satisfactory fashion some of our most important propositions. It is the case of *Neff* v. *United States*, 165 Fed., 273—opinion by Circuit Judge Sanborn. Neff was convicted under R. S. 5418, for falsely altering an affidavit and transmitting the same with other forged affidavits to a register and receiver, for the purpose of defrauding the United States, by inducing those officials to accept the spurious documents in final proof of a certain timber culture claim, and thereby ultimately obtaining a patent to the land. It was contended that all rights under the entry had expired by lapse of time before these "proofs" were presented to the land office, and that consequently the United States could not have been defrauded.

In answer to this the court said (p. 276):

> Let it be conceded that if the affidavits transmitted by the defendants could not have been used before the local officers of the Land Department to defraud the government of the land which Williams claimed, then the defendant could not have been guilty of the offenses charged against him; that, if the officers of the Land Department could not have issued a patent upon these affidavits that would have deprived the United States of the land, the use of the affidavits to obtain the patent could not have defrauded it; but if those officers could have issued such a patent upon those affidavits, then they might have been used to defraud it. Let it be further conceded for the purpose of the first consideration of this question that the entry of Williams had expired, that it was error for the officers of the Land Department to receive the affidavits in evidence, that it was error for them to decide that the original entry was still effective, and that it was error for them to determine that the entry and the affidavits proved that Williams was entitled to the land. Nevertheless, might not the United States have been deprived of the land by their decision in favor of Williams and their patent issued upon the affidavits? By the Act of March 3, 1849, * * * the Secretary of the Interior is charged with the supervision of the public business of the United States relating to the public lands; and by the act of July 4, 1836 * * * the Commissioner of the General Land Office is required to perform, under the

direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government. Applicants for the public lands are required to apply in the first instance to the register and receiver of the local land office of the district in which the land is situated. * * * The land to which Williams attached his timber-culture claim was public land subject to the disposition of the Land Department and within its jurisdiction. When a claim is made under the homestead, the pre-emption, or the timber-culture laws to a portion of the public domain that is subject to its disposition, the Land Department must hear the evidence offered and decide whether or not the claimant is qualified to acquire the lands under the terms of those laws, whether or not the land claimed is subject to the laws, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land. The Land Department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to the public land which it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. A patent to land

which that Department has the power to dispose of is both the judgment of that tribunal and a conveyance of the title to the land to the party adjudged to be entitled to it, and it is impervious to collateral attack for errors of law or mistakes of fact committed in the decision of the case it determines. * * *

It is true that the United States, or any party who has the equitable title under it, may maintain a bill in equity to set aside such a patent or to declare it to be held in trust either on account of error of law, fraud, or gross mistake * * *, but in the hands of an innocent purchaser for value the title under such a patent is impregnable, and the United States may not maintain a bill to avoid the patent or to recover the title * * *.

In June, 1903, Williams applied to the local officers of the Land Department to prove up his timber-culture claim. His original entry of March 15, 1889, was uncanceled upon the books of the Land Department. The land was subject to the disposition of the officers of that Department, and the power was vested in the local officers, and the duty was imposed upon them, to hear and decide the question whether or not Williams was entitled to a patent to the land. The land, the issue, and the parties were within the jurisdiction of the Land Department, and the first action and hearing upon the application of Williams was within the jurisdiction of the register and receiver of the local land office. If it was error for the officers of that Department to receive the forged affidavits in evidence and to hold

that Williams' original entry was still effective, nevertheless those affidavits might have been used before them to defraud the United States out of the land by procuring a title to Williams and then causing this title to be conveyed to an innocent purchaser. The defendant, therefore, can not escape punishment on the ground that the affidavits were incapable of use before the officers of the Land Department to defraud the United States. The argument that one who by false affidavits deceives a judicial officer and induces him to render an erroneous judgment ought to escape the punishment prescribed for such deceit because he also induces the officer by means of those affidavits to commit an error of law in their reception and in his rendition of judgment upon them does not appeal to the reason with persuasive force.

Respectfully submitted.

ERNEST KNAEBEL,

Attorney in Charge, Public Lands Division.

APRIL, 1911.

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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1909.

No. 581

United States of America,
Plaintiff in Error,
vs.
William D. Hammers,
Defendant in Error.

Brief of Messrs. Valentine & Newby, Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

The indictment in this case charges the defendant with the crime of perjury under section 5392 R. S.

The allegations of the indictment, so far as material to the points here involved, are, substantially, that on August 14, 1907, one Granville M. Boyer made and filed, in the land office at Los Angeles, desert land entry No. 3903 covering certain desert land in the Southern District

of California, in what is known as Imperial Valley; that on the 26th day of August, 1907, twelve days later, he assigned and transferred to one Beulah Rose Beekler all of his right, title and interest in and to said entry and in and to the lands embraced therein; that on January 30, 1908, the said assignee, Beulah Rose Beekler, applied to make the first yearly proof of expenditure for the reclamation of said land, and that the defendant, as a witness on behalf of said assignee, on said 30th day of January, 1908, made false affidavit as to the aomnut of such expenditure. It is upon this affidavit that the charge of perjury is predicated.

The defendant demurred to the indictment on the ground that it did not state facts sufficient to constitute an offense against the United States. The demurrer was sustained, and the writ of error herein is based upon that ruling of the court below.

Numerous specifications of alleged error committed by the court in the above ruling are assigned by the plaintiff in error; [Tr. folios 46 to 53], but all hinge and are based upon the single question whether or not, under the Desert Land Laws of the United States, a desert land entry may be assigned by the entryman before the work of reclamation required by said laws has been completed, and equitable title vested, and, therefore, do not call for separate consideration. That

the desert land laws do not permit of such assignment was the only proposition presented and urged by defendant in support of his demurrer in the court below, and is the only proposition upon which we rely in this court.

It was conceded by counsel for the government in the argument on the demurrer in the District Court, that, if a desert land entry is not assignable prior to completion of reclamation and vesting of title, the affidavit upon which the alleged perjury in this case is predicated, is wholly immaterial, and the demurrer should be sustained; and we assume that the same will be conceded in this court.

ARGUMENT.

FIRST POINT.

UNDER THE DESERT LAND ACT OF MARCH 3D, 1877, (19 STAT. L. 107; 2 U. S. COMP. ST. 1901, PAGE 1548; 6 FED. ST. A. 392) THE ENTRYMAN ACQUIRED NO RIGHT PRIOR TO COMPLETION OF RECLAMATION WHICH HE COULD SELL OR TRANSFER.

I.

The Courts and the Land Deparment Have So Held.

The court has passed squarely upon the question of the right of a desert land entryman, under the Act of 1877, to assign his entry prior to reclamation.

In Williams v. United States, 138 U. S. 522-523 (34 Law Ed. 1026) the plaintiff in error, Williams, had, on May 19, 1879, made a desert land entry covering 240 acres in the state of Nevada; on July 26, 1879, he conveyed 80 acres embraced in said entry to a mining company for $5000; that company later on became financially embarrassed, and the title to said 80 acres passed by receiver's and sheriff's deeds on December 16, 1881, to Matthisson and Ward; on May 20, 1882, Williams executed relinquishment to the government of the said desert land entry, and at the same time made application to the state for the purchase of the same lands as agricultural lands, and the state, at his instance, immediately applied to select the lands in question as unappropriated public land under an act of Congress making provision therefor. On August 12, 1882, by direction of the Land Department, cancellation of the desert land entry was made on the books of the local land office; and later on, in May, 1883, the lands were certified to the state, and thereafter the application of Williams to purchase from the state was accepted and the contract therefor entered into. The specific acts of fraud on the part of Williams to accomplish the foregoing results fully appear in the opinion of the court. On December 18, 1884, bill of complaint was filed in the Circuit Court for the District of Nevada, by the United States, against

Williams, to cancel and vacate the listing of said lands to the state, and to cancel the contract between him and the state of Nevada, and for an adjudication that Williams had no interest in the land, on the grounds that said lands were improperly certified to the state, that in equity it had no title, and its contract with Williams transferred nothing to him. Mr. Justice Brewer, speaking for the court, said, at pages 522 and 523, Supreme Court Report:

> "This brings us to the final contention: That if there had been no erasure, that if the contest had been had, the lands must inevitably have been certified to the state of Nevada, because they were within the description of the Act 'Unappropriated, nonmineral public land,' selected by the state; *that the desert land entry by Williams, 1879, gave to him no right which he could sell or transfer;* that therefore the deed from him to the Philadelphia Company passed nothing as against the government; that, having failed to reclaim the land within the time prescribed, his right in the land ceased, and his cancellation of his desert land entry was a mere matter of form to clear the face of the record. * * * *In the main, we do not doubt these propositions of law.*"

And after discussing the equities of the case, proceeds as follows:

> "The certification after selection by the state is to be approved by the Secretary of the Interior. This is no mere formal act. It gives to him no mere arbitrary discretion,

> but it does give power to prevent such a monstrous injustice, as was sought to be accomplished by these proceedings. It gives the power to the Secretary to deny this application of the state, and refuse to approve its selection, and hold the title in the general government *until, within the limits of existing law or by special Act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government.*" (Italics ours.)

We have quoted thus at length from the opinion for the reason that at page 26 of the brief for plaintiff in error filed by Messrs. Eshelman and Trippet, it is contended that this case really recognizes the assignability of such an entry, because the judgment therein ordered protected the interest of the assignee as against the fraudulent claims of Williams. But we submit that instead of recognizing the valadity of such assignment, the court squarely holds that the entryman acquires no rights which he can sell or transfer; but that, owing to the peculiar equities in the case, the title should be held in the government *until within the limits of existing law or by special Act of Congress the assignee shall be enabled to obtain title from the government.*

In United States v. Mackintosh, 85 Fed. 333, at page 338, District Judge Phillips, speaking for the 8th Circuit Court of Appeals, said:

> "There is nothing in the statute (Desert Land Act of March 3, 1877) denouncing a mere intention on the part of the locator to transfer his or her title, *when perfected*, for the benefit even of a corporation, *when the locator pays the purchase money, and complies with the requirements of the statute respecting irrigation.*"

Thus, inferentially holding that such transfer could not be made until the locator had fully complied with the requirements of the statute as to payment and irrigation.

The decisions of the Land Department subsequent to April, 1880, until the amendatory act of 1891, uniformly hold desert land entries not assignable prior to reclamation under the Act of March 3, 1877.

In the case of S. W. Downey, 2 C. L. L. 1381, certain persons having made desert land entries in the then territory of Wyoming, sold and assigned their rights therein, before reclamation, to other parties for a valuable consideration, claiming that they were justified in so doing by the circular letter issuing from the office of the Commissioner of the General Land Office of date March 12, 1877. Mr. Secretary Schurz, in replying to the Commissioner's letter in this matter, on April 15, 1880, said:

> "In your letter of transmittal, you referred to the ruling of this department that such

> claims are not assignable; but in view of the fact that these claims were assigned before such ruling by the department was made, you request to be informed whether such cases as herein mentioned shall be regarded as exceptions to your said ruling. I think that there can be no doubt that the claims were not assignable. The law by which the entries were allowed to be made treats them as the claims of the party making the entry. If proof is made showing a compliance with the law, 'a patent for the same shall be issued to him.' "
>
> "The claims not being assignable, no rights passed to the purchaser when the assignment was made. * * * Undoubtedly the parties have equities which ought to be respected if the law would warrant it; but if a patent ever issues upon the claims entered and assigned, as set forth in the letters above mentioned, it must issue to the parties who originally made the entry, unless additional legislation be obtained whereby the assignments shall be legalized."

In the case of Charles Bowling, 1 L. D. 28, Bowling claimed to be the assignee of three desert land entries, and applied for patent and to make final proof. Commissioner McFarland in a letter dated March 2, 1883, to the local land officers, said:

> "To recognize the assignability of desert land claims would be to acquiesce in an evasion of the law, and to enable one person to acquire title to an amount of land in excess of the legal limitations. It has been held by the Hon. Secretary of the Interior that

> desert land claims are not assignable, and that no rights pass to the purchaser when such assignments are made. (S. W. Downey, 2 C. L. L. 1381)."

In the case of David B. Dole, 3 L. D. 214, desert land entries No. 52 and 53 were made, respectively, by Charles H. Bussard and Mary Hunt, April 16, 1878, and were thereafter each assigned March 3, 1879, by the entryment to one Irvinson, and subsequently assigned by Irvinson to Dole. No improvement of the tract was made by either of the entrymen. That made was by Irvinson or Dole. The entries were held for cancellation for non-compliance with the law by the entrymen, and for attempted conveyance of title before patent, in fraud of the law. Teller, Secretary of the Interior, in a letter of December 1, 1884, to Commissioner McFarland, said:

> "Your circular instructions of March 12, 1877 (4 C. L. O. 22) under the Desert Land Act of March 3, 1877 (19 Stat. 377) requires the local officers, after proof of the desert character of the land, the filing of proper declaration, and the payment of a certain sum of money, to issue a certificate to the declarant, stating, among other things, that if within three years therefrom the declarant, 'or his assignee or legal representatives,' should reclaim the land as required by the act, and pay an additional sum of money, he or they should be entitled to a patent for the land. They also provided, that, at any time within three years from the date of the certificate, 'the proper party'

might make the required proof. I understand from this that your office recognized the right of assignment of desert land entries. and that the assignee might make the proof required of the entrymen and become entitled to patent in his own name, although I find nothing in the act to warrant so broad a construction of its provision — especially as it expressly provides that the declarant shall make oath that *he intends to reclaim the land*, and that upon proof of reclamation *patent shall issue to him*, and as the right of assignment is not directly authorized — yet these instructions had the force of law, and the parties had the right to assign; that this was the legal construction of the act, and that the assignees of such entrymen would be protected in their purchases and have the rights of entrymen. I think it immaterial that the construction was erroneous and unwarranted so long as it was the official announcement of the law by the Land Department. These instructions continued as the law and practice of your office until April 15, 1880, when Secretary Schurz ruled, in the case of S. W. Downey (7 C. L. O. 26) that desert land entries were not assignable. I concur in that ruling."

In Riggan v. Riley, 5 L. D. 595, Acting Secretary Muldrow, in a letter to Commissioner Sparks of date of April 12, 1887, said:

"It is evident that said agreement is in effect an assignment of the interest of each of said parties in said entries to said company, and, if fully executed, the company would obtain title to more than 1800 acres of land. It has been uniformly held by this de-

> partment that assignments made since April 15, 1880, will not be recognized, and those entries made prior to said date, which have been assigned, can not be confirmed for a larger amount than 640 acres."

In the case of French *et al.*, 5 L. D. 19, four desert land entries were made by Jennings, Dedman, Laswell and Hallett, respectively. When final proof was made, none of these entrymen personally appeared, but they were represented by one French who appeared with powers of attorney from them severally, to do with respect to the land covered by their respective claims, whatever they themselves might do if present. The claims were contested on the ground that they were made in the interest of and for French. The proof offered by French, as attorney in fact for the entrymen, was rejected as illegal and invalid. It was thereafter set up by French that he had become the assignee of said claims prior to the tender of final proof, and Secretary Lamar in a letter to Commissioner Sparks of July 23, 1886, concerning this case, said:

> "As to the claim now set up by French that he is and was at the date of final proof, and prior thereto, the assignee of the parties named, and that he is for that reason entitled to patents covering the four tracts embraced in the claims as originally made by them, it need only be said that while assignments of desert land entries before final proof were recognized by the department

> until its decision of April 15, 1880, in the case of S. W. Downey it has been very distinctly ruled that the acquisition by any one person of land under the desert land law is limited to 640 acres."

In the case of Henry W. Fuss, 5 L. D. 167, Fuss acquired by assignments two desert land claims prior to completion of the reclamation. Later, to wit, on the 30th day of March, 1880, Fuss, as assignee, made final proof on both entries, which proof was accepted by the Register and Receiver, whereupon Fuss made full payment for the land and received final certificate setting forth that he was entitled to patents therefor. The Commissioner of the General Land Office declined to accept final proof and issue patent thereon, upon the authority of the case of S. W. Downey. Secretary Lamar, discussing the case, at page 168, said:

> "An examination of the act itself develops nothing which in terms either authorizes or prohibits assignments. Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment."
>
> Miner v. Marriott, 2 L. D. 709;
>
> Robbs, Lessee, v. Irvine, 15 Ohio, 703.

In a circular issued by Commissioner Sparks to Registers and Receivers of date June 27, 1887, it is said:

"Desert land entries are not assignable, and the transfer of such entries, either by deed, contract, or agreement, vitiates the entry. An entry made in interest or for the benefit of another person, firm or corporation, or with the intent that the title shall be conveyed to any other person, firm, or corporation, is illegal."

II.

The Law Requires of the Entryman a Bona Fide Intent to Reclaim.

Section 1 of the Act of 1877 provides, among other things:

"That it shall be lawful for any citizen of the United States or any person of requisite age who may be entitled to become a citizen, and who has filed his declaration to become such and upon payment of twenty-five cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land * * * by conducting water upon the same, within the period of three years thereafter."

The first requisite under the law is a declaration under oath by the entryman "that he intends to reclaim," etc. The purpose of the oath is to secure the true intent of the entryman. As said by Humphrey, Dist. Judge, in U. S. v. Armour & Co., 142 Fed. 808, at page 825:

"The purpose of the oath was to secure the truth. That is always the purpose of the

> oath; that is the only purpose of the oath; and, to be certain that we get the truth, the court always starts out by putting the witness under oath."

There must be, at the time of making that declaration, a bona fide intent on his part, honestly and faithfully, to comply with the law by doing the things requisite to earn the title to the land he applies to enter. Otherwise, he would, at the very inception of his proceedings, not only be burdening his conscience with rank perjury, but also be practicing a gross fraud upon the government. For the government is interested in having its public land fall into the possession and ownership of those of its citizens who are qualified to acquire them, and who, as actual settlers, will, in compliance with the terms of the offer made, honestly endeavor to develop them to a state of productiveness, thereby acquiring homes and profitable employment for themselves and at the same time contributing to the general prosperity and welfare of the country. For the purpose of affording to the desert land entryman ample opportunity to accomplish reclamation in the manner prescribed by the law, it relinquished to him the use and possession of the land sought during the entire period of three years allowed by the Act of 1877, for such reclamation. (Sallee v. Corder, 67 Cal. 174; 32 Cyc. 836). Immediately upon his making the necessary proof of citizenship, filing

his sworn declaration of intention to reclaim, and paying the necessary twenty-five cents per acre, the applicant was admitted to the exclusive use and possession of the land included within his entry, and was entitled to hold it for the entire period of reclamation, even though he did nothing toward reclaiming it. This operated to withdraw that land from entry by any other person during those three years. So that the government, by virtue of the entry, was deprived, not only of the use and possession of the land during that entire period, but if the entryman was not acting in good faith and did not intend to reclaim the land, was also deprived of the opportunity of having it entered by some bona fide entryman who would proceed honestly to reclaim it. An entryman, therefore, who made his initial entry without intention of faithfully and honestly endeavoring to reclaim the land, but for the purpose of withholding it for speculation until favorable opportunity and then assigning it, thereby perpetrated upon the government a palpable and unconscionable fraud.

As said by Mr. Justice Van Deventer, then speaking for the Circuit Court of Appeals, Eighth Circuit, in Sterns v. United States, 152 Fed. 900, at page 906, in regard to the good faith of a homestead entryman at the time of making his application for entry:

> "But the right to the possession, like the right to make the entry, is extended only to those who *intend to earn the title by faithfully and honestly complying with the law. To secure the entry by feigning such an intention is to secure it fraudulently*, and to then use it for a mere cover for obtaining or prolonging an unlawful possession, is to defraud the United States of the possession." (The italics are ours.)

In the particular of the *intent* of the applicant when making his initial entry, the affidavit required of the homestead entryman does not differ materially from that required of the desert land entryman — the one must declare that "he will honestly and faithfully endeavor to comply with all the requirements of the law as to settlement," while the other must declare that "he *intends* to reclaim a tract of desert land * * * by conducting water upon the same;" therefore the language of Judge Van Deventer above quoted applies with equal force to the desert land acts.

Under the Timber and Stone Act (Comp. St. 901, p. 1545) the applicant must file a statement under oath to the effect, among other things, that he does not apply to purchase the land on speculation, but in good faith, to appropriate it to his own use and benefit. Here again the government requires the same element of good faith on the part of the applicant as is required in the Homestead Act, and, as we insist, by the provisions of the desert land act. He must satisfy the land

officers by his oath of his honest intent to comply with the conditions and requirements of the act. In this respect, we submit that that act is similar to the Desert Land Act, and the cases arising thereunder authoritative for a proper construction of the latter act.

In United States v. Brace, 149 Fed. 869, the indictment in effect charged the defendant with having instigated and procured the entryman, who had made an entry under the Timber and Stone Act, and who had made the required affidavit in his initial entry, to give, wilfully, false testimony in relation to the bona fides of his application upon the occasion of his making final proof of his right to enter the land for which he had applied. It was insisted on the part of the defendant that under the statute the officers of the local land office had no jurisdiction upon such final hearing to inquire whether the initial entry was made in good faith or not, because, by section three of that act, if no adverse claim is filed, the applicant is required only to prove that the notice of application was duly published, and that the land was of the character contemplated in the act, and upon proof of these facts and the payment of the purchase money and fees, that the applicant should be permitted to enter said tract. It was contended that the statute having expressly named the facts which were to be proved at the final entry, it was not competent for the local land officers to require

proof of other facts, such as the good faith of the applicant in making his initial inquiry. Judge De Haven, speaking upon this question, at page 872, said:

> "The answer to this argument is found in the general intent or policy of the statute, and the particular provision therein making it the duty of the Commissioner of the General Land Office to prescribe regulations for the purpose of carrying the law into effect, and in the regulations made in pursuance of the authority thus conferred. The obvious intention of the statute is to restrict the right to purchase the lands to which it refers *to persons who in good faith enter the same for their own use and benefit.* The applicant must not be a 'dummy' or a mere nominal purchaser, who in making application to purchase simply allows his name to be used for the purpose of acquiring from the government the legal title to the land applied for, with the intention of immediately transferring such title to some other person under a direct or indirect agreement or understanding that such is the purpose for which the entry is made; nor must he apply 'to purchase the same on speculation.' Olson v. United States, 133 Fed. 840, 67 C. C. A. 21." (Our italics.)

In Olson v. United States, 133 Fed. 849, the defendants were charged with conspiracy to defraud the United States out of the land in question, in violation of the Timber and Stone Act of the United States, and Munger, Dist. J., at page 853, speaking on the question of the applicant's bona fide intent when making his initial entry, said:

> "What the statute denounces is that a party shall not, at the time of the purchase, have directly or indirectly made any agreement or contract in any way or manner, with any person or persons, by which the title which he may acquire shall inure, in whole or in part, to the benefit of any person except himself; *that the application for the land must be made in good faith for his own exclusive use and benefit*, and not as the agent or hireling of another to obtain the land for some one besides himself. This view of the meaning of the statute forbids sustaining the contention of counsel for plaintiff in error that there can be no violation of the act unless an enforceable agreement was made by the applicant before his application to enter the land whereby the title should inure to the benefit of another. To hold that the provisions of the statute that the applicant shall not have in any way or manner, directly or indirectly, made any agreement or contract in writing good under the statute of frauds, would be to destroy the prohibitive conditions mentioned, and render ineffectual the object and purpose of the statute." (Our italics.)

In Van Gesner v. United States, 153 Fed. 46, Judge Ross, rendering the decision for the Circuit Court of Appeals, Ninth Circuit, at page 53, said in regard to the declaration under oath required to be made by an applicant to purchase land under the Timber and Stone Act:

> "It is perfectly plain, from the provisions of the statute and the rules and regulations of the Land Department, that, in order for any person to effect a purchase of any land

> under the act in question, he must first make an application to purchase by a verified written statement, which statement is an affidavit as to the truth of the matters therein declared, and, after compliance with the prescribed procedure, must satisfy the register of the Local Land Office by deposition, in which he and such witnesses as he may produce are examined and cross-examined under oath, of the truth of the matters required by the statute to be shown as a prerequisite to the authorized purchase. It is just as plain that intentional false swearing by the applicant in either instance, in respect to any of the material matters so required to be declared and sworn to, constitutes the crime of perjury, which crime is defined, not by any rule or regulation of the Land Department, but by a statute of the United States."

Cases arising under the laws relating to the sale of coal lands belonging to the United States, also furnish some analogy to those arising under the desert land laws in the respect that neither of those laws contains any express provision against alienation by pre-contract or otherwise, nor does either of them contain any express provision to the effect that the entry must be made for the use and benefit of the entryman; but both contain limitations upon the number of acres a person can acquire. (Coal land laws, Sections 2347, 2348, 2349 and 2350, R. S., Comp. Stat. 1901, pages 1440, 1441.) Yet the decisions under the coal land laws are to the effect that the entry must be made in good faith and for the use and benefit of

the entryman. In the recent case of United States v. Keitel, 211 U. S. 370 (53 L. Ed. 230), the defendants were indicted for conspiring to defraud the United States of the title and possession of certain coal lands by procuring certain persons as agents to enter the coal lands in their own names, ostensibly for their own benefit, but in reality for the use and benefit of the defendants, and Mr. Justice White, speaking for the court, said:

> "True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States to sell the same *after he has become the owner of the land.* (Italics ours,) the absence, however, of a limitation on the power to sell after acquisition affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. * * * The legislation of Congress subsequent to the coal land laws, indicates that Congress contemplated, in enacting the prohibition against more than one entry, the distinction between an entry made by one for himself with the full power of disposition after entry, and an entry made by one ostensibly for himself, but in reality for another. Thus, under the timber culture act of June 14, 1878, chap. 190, 20 Stat. at L., 113, which conferred authority upon citizens of the United States, or persons who had declared their intention to become such, to make one entry of not exceeding one quarter section of land for the cultivation of timber, the statute was sedulous to require that the per-

son desiring to hold and cultivate the land should, at the time of making his entry, swear in his application that his filing and entry was made for his own exclusive use and benefit. And the public policy lying at the foundation of the prohibition against an entry of land for the conceded benefit of another, whilst leaving full power of disposition in one who acquired the land in compliance with the statute, was pointed out in United States v. Budd, 144 U. S. 154, 36 L. Ed. 384, 12 Sup. Ct. Rep. 575, where, in considering the Timber and Stone Act of June 3, 1878, chap. 151, 20 Stat. at L. 89, U. S. Comp. Stat. 1901, p. 1545, it was said (p. 163): 'The act does not, in any respect, limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement,—the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied.'"

And the learned Justice further says, at page 392:

"There is consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patent sought to be cancelled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly."

It might very pertinently be said in the case at bar that if the desert land entryman should in his declaration under oath state that he intends to assign his inchoate rights to another who might reclaim or who might in turn reassign to another, there could be no question that his application to enter would be denied, and yet that is the very contention that is being made by the learned counsel for the government, to wit, that the entryman need not reclaim but may transfer his inchoate rights to another who may reclaim or who may in turn reassign to still another.

In Pereles v. Weil, 157 Fed. 419, Sanborn, District Judge for the Eastern District of Wisconsin, said:

> "An individual having exercised his right of entry by securing 160 acres, may buy of others by ordinary purchase as much more as he pleases; but he can not acquire an acre from the government. If he does so either by direct application in his own name or by employing another, to make entry in the name of the latter, and then convey to him, he at once becomes involved in conspiracy, perjury and fraud. He violates the policy of fair play found in every disposal statute ever passed by Congress, designed to secure equal opportunity for all, and incidentally, but to a limited extent, to prevent monopoly. He thus commits a fraud on the United States by securing its lands in a way not authorized by the law, and it is of no consequence that the government, having obtained the money, suffers

> no pecuniary loss. A definite and important public policy has been violated and circumvented, which may be frustrated either by avoiding the patent, or punishing the offender if he has sworn falsely or suborned perjury, or has conspired with his tool or dummy to commit the fraud."

In United States v. Lonabaugh *et al.*, 158 Fed. 314, the defendants were indicted in the District Court of Wyoming for conspiracy to defraud the United States of the title, use and possession of its public coal lands. Reiner, Dist. Judge, commenting upon the good faith of an entryman under public land laws of the United States, said:

> "Whenever it is made to appear that the wrong disposition of the public lands was induced by fraudulent practices on the part of the party charged therewith and done for the very purpose of circumventing the law and warping its due administration, the United States is defrauded. * * * *It may well be conceded that in all cases where the entryman has acted in good faith and has fully complied with the provisions of the statute, has not been guilty of any fraud, and has done no act inconsistent with the law, he has acquired a right of which he can not be deprived, because,* as was said by the Supreme Court in the pre-emption case of Myers v. Croft, 13 Wall. 291, 'The object of Congress was attained when the pre-emptor *went with clean hands* to the land office and proved up his right, and paid the government for the land.' If it be true in a given case that the entry of land was not

made in good faith but in fraud of the law, certainly it can not be said that the claimant has become the equitable owner of the land, and that the United States is merely trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon and will destroy any asserted title to property, no matter in what form the evidence of such title exists." (Our italics.)

"A fraud upon a statute is a violation of the statute."

Bank of U. S. v. Owens, 2 Pet. 527; 7 L. Ed. 508, p. 536.

In the case of the United States v. Herbert O. Oakley *et al.*, pending in the District Court of the United States, for the Southern District of California, wherein the defendants are charged with conspiring to defraud the United States of the title and possession of certain desert lands, His Honor, Judge Wellborn, in ruling upon a demurrer to the indictment, had occasion to pass upon the question of the good faith of a desert land entryman in making the declaration required by section 1 of the Act of 1877, and in the written "Conclusions of The Court on Demurrer" filed in that case, said:

"It is impossible for me, in the face of the provisions of the Desert Land Acts, which positively and unequivocally prescribe as the first step in proceedings to acquire desert land, a declaration by the entryman under oath 'that he intends to reclaim said tract by conducting water upon the same,'

> to do otherwise than hold that, for a person to knowingly make this declaration, when he does not at the time of making it, intend so to reclaim said tract, not only imports moral obliquity, but is a fraud upon the government."

In Adams v. Church, 193 U. S. 510 (48 L. Ed. 769), which was an action based upon an agreement to convey a timber-culture entry as soon as title thereto should be obtained from the government, Mr. Justice Day, speaking for the court, said:

> "If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him, upon making such entry, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest, to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law."

In Arnold v. Christy, 33 Pac. Rep. 619, the Supreme Court of Arizona said:

> "We know of no rule of the Land Department holding that *one who has entered desert lands in good faith* may not make an agreement to convey the land after the title shall vest in him." (Our italics.)

The fact that the assignee of the original entryman, or some subsequent assignee, may proceed with and complete the reclamation of the

land within the statutory period, is no answer to the deliberate fraud perpetrated upon the government by the entryman who makes declaration under oath that he intends to reclaim, without in fact having such intention. It has so often been decided by this and other courts as now to be regarded as fundamental, that fraud upon the United States, used in a criminal sense, is not limited to fraud upon property or property rights of the government, but may consist in impositions upon its rights, privileges, operations and functions.

In Hyde v. Shine, 199 U. S. 62, at page 82, (50 Law Ed. 97), this court, speaking by Mr. Justice Brown, said:

> "Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud, and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands, and suffered no pecuniary loss. MacLaren v. Cochran, 44 Minn. 255, 46 N. W. 408. The law punishes the false practices by which the lands were obtained, and the question whether the government stands in the position of a bona fide purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law."

In Curley v. U. S. 130 Fed 1, the defendants were charged under Sec. 5440 R. S. with con-

spiracy to defraud the United States by having the defendant Curley falsely personate the defendant Hughes in a civil service examination of applicants for positions in the post-office department as letter carriers. In discussing whether or not such act constituted a fraud upon the government, in contemplation of Sec. 5440 R. S., the court, at page 4, said:

> "Congress intended to protect the government in its rights, privileges, operations and functions against all fraudulent operations—impositions upon its rights as well as properties, and to this end embraced the most general terms and broadest possible phraseology, and declared that 'if two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties does any act to effect the object of the conspiracy, they shall be liable,' etc. The statute thus clearly and expressly carries its provisions beyond wrongs which had been expressly declared to be offenses against the United States, and extends its provisions so as to embrace fraud in any manner or for any purpose and it would thus seem apparent that it was intended by Congress to carry the meaning of the statute beyond frauds in respect to property and property rights by declaring against fraud for any purpose."

A similar case is found in U. S. v. Bunting, 82 Fed. 883, and a similar opinion by the court is there expressed.

In U. S. v. Bradford, 148 Fed. 413, District Judge Parlange, speaking for the Circuit Court of the Eastern District of Louisiana, where the defendants were indicted for conspiracy to defraud the United States of certain certificates of location, otherwise known as land scrip, and of the title and possession of certain public lands, said:

> "It is certainly just as important that the government should not be defrauded with regard to its operations, even if no pecuniary value is involved, as that it should not be defrauded of its property. In fact, I believe that it is far more important that the government should be protected against the former class of frauds, and it would be astonishing, indeed, if Congress had failed to afford protection against such frauds."
>
> McGregor v. U. S. 134 Fed. 195.

So that while it may be urged that the government is receiving the same benefit from the reclamation by an assignee that it would receive from reclamation by the original entryman, yet the fact remains that imposition and fraud has been practiced upon the government in the first instance by the entryman stating under oath that he proposes to do certain things in compliance with the law, when in fact he did not have any such intention; he has thus acquired from the government valuable possessory rights which he could never have acquired had he disclosed his true intent.

III.

The Law Requires the Entryman Personally to Fulfill the Promise of Reclamation Made in his Sworn Declaration.

The fact, as above shown, that the government demands of the desert land entryman, as a condition of entry, a bona fide intent on his part to reclaim the land, and requires absolute assurance of that intent by imposing upon him the sacred obligation of an oath, the violation of which would be visited with all the pains and penalties of perjury, is, we submit, conclusive of its further intent and purpose thereby to bind and hold him, personally, to a faithful performance of that promise; otherwise, the oath of intention is but an empty form, devoid of any force or significance whatever, and the provision of the statute requiring it is absolutely meaningless. The law does not require idle acts, nor does the government place a premium upon perjury by exacting of the applicant an oath that he intends to reclaim, and immediately thereafter permit him to violate his oath and escape the obligation thereby incurred by assigning his entry to some one else. If the entryman was, under the law, entitled to change his mind immediately after entry, and, instead of honestly endeavoring to reclaim the land in accordance with his sworn intent, allowed to speculate with the rights thus acquired, what benefit could the government re-

ceive from the exaction of that oath, what possible purpose, useful or otherwise, could it subserve? If reclamation of its desert lands, as contended by counsel for plaintiff in error, was the primary and in fact the sole purpose of the government in enacting the law of 1877, regardless of whether such reclamation be accomplished by the entryman or by some assignee, then that purpose would have been much more clearly expressed and the act shorn of much that otherwise is confusing and uncertain, had the provision requiring the entryman to file declaration under oath that he intends to reclaim been omitted. The remaining provisions of the act plainly and in apt language impose the condition of reclamation as a pre-requisite to issuance of patent.

It was urged, however, in the court below, that the promise of the entryman to reclaim in the manner prescribed by the act, contained in his sworn declaration to that effect, extends to and binds his assignee, and that reclamation by the assignee fulfills the promise and the obligation of the entryman; that it is immaterial to the government who reclaims, so long as the condition of reclamation is complied with by some one. There is nothing in the act nor in the rules and regulations of the Land Department requiring any person other than the entryman to make or file an affidavit of intention to reclaim, and it will hardly be contended that an assignee would be

bound by the oath of the entryman, when, if contention of counsel is correct, that entryman himself is not bound by it. But it is obvious that if the right of assignment before reclamation did exist under the Act of 1877, no obligation to reclaim extended to the assignee by virtue of the sworn declaration made by the entryman, and none was assumed by him; he, in turn, could reassign immediately without the expenditure of a single dollar toward reclamation. The government parted with possession of the land immediately upon the filing of the declaration and payment of the twenty-five cents per acre by the original entryman, and no proof of annual expenditure was required under the Act of 1877, such as is required by the Amendatory Act of 1891. So that, pending the three year period of reclamation, assignment and reassignment without number could be made and the door thus thrown open for the wildest speculation, without any effort whatever toward reclamation. The obligation of reclamation would fall only upon the last assignee who, finding himself unable to get rid of the entry before expiration of the statutory period of reclamation, would be obliged to reclaim in order to protect himself from loss. This obligation would fall upon him because the law required reclamation within the three years allowed for that purpose, and because of the provisions of the act to the effect that satisfactory

proof of reclamation must be made to the register and receiver in the manner and within the time prescribed by the statute before patent would issue; and it would be wholly immaterial, so far as the obligation on the part of the assignee to reclaim is concerned, whether the law required of the entryman an affidavit of intention or not. In other words, if the entry was assignable before reclamation, the obligation upon the assignee to complete the reclamation within the time and in the manner prescribed, existed as a condition precedent to issuance of patent, regardless of the oath of the entryman; no patent would issue under any circumstances unless and until such reclamation had been accomplished, and the fact that the entryman had made oath "that he intends to reclaim" in no wise would add to or affect the obligation that otherwise rested upon the assignee. Hence we repeat that if the provision in the act requiring the entryman, as a condition of entry, to file a declaration under oath that he intends to reclaim, was not for the purpose of assurance to the government that he, personally, would carry out his sworn intention, then it could serve no other purpose and was without any force or effect whatever, and had better been omitted from the act. Why could it not with equal propriety be said that the affidavit required of the homestead entryman to the effect, among other things, that his application is honestly and in good faith

made for the purpose of actual settlement, that he or she will faithfully endeavor to comply with all the requirements of the law as to settlement, etc., is not binding upon the entryman? This amounts to nothing more than a sworn declaration of bona fide intention or promise to do, or honestly and faithfully endeavor to do the things necessary to earn title under the homestead law. And yet the homestead entryman is personally held to a strict observance of these declarations and promises in his affidavit. It must be presumed that the provision requiring the entryman to file a declaration under oath "that he intends to reclaim" was inserted in the act by Congress for some purpose, and to have some effect, and the act must be so interpreted, if possible, as to give effect and meaning to that provision. One of the fundamental canons of statutory interpretation is that effect must be given, if possible, to every word, clause and sentence in a statute.

Says Mr. Justice Field, in Bernier v. Bernier, 147 U. S. 242, at page 246 (37 Law Ed. 152):

> "It is a general rule, without exception, in construing statutes, that effect must be given to all their provisions if such construction is consistent with the general purposes of the act, and the provisions are not necessarily conflicting."

In Washington Market Co. v. Hoffman, 101 U. S. 115 (25 Law Ed.) Mr. Justice Strong said:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant;' this rule has been repeated innumerable times."

In Inhabitants of the Township of Montclair v. Ramsdell, 107 U. S. 147 (27 Law Ed.) this court, by Mr. Justice Harlan, said:

> "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."

In Rice v. Minnesota etc. Ry. Co., 1 Black (U. S.) 370, (17 Law Ed. 147), the court said:

> "It is not competent for this court to reject or disregard a material part of an act of congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together."

In United States v. Fisher, 109 U. S. 143 (27 Law Ed.) it was held that where an act of congress appropriated a certain sum "in full compensation" for services of a public officer during the

ensuing fiscal year, the court had no right to eliminate the words "in full," by adjudging the officer entitled to a larger sum antecedently prescribed for him in the revised statutes.

In re Schallenberger, 72 Fed. 491, Mr. Justice McKenna, then judge of the Circuit Court of the Northern District of California, said, respecting the interpretation to be placed upon section 493 of the McKinley tariff act:

> "Considering the many things a tariff law must accommodate, it is not strange that a rigid logical application of principle should not be made, and, because not made, it does not follow that plain provisions should be disregarded. The purpose of an act is, undoubtedly, the light by which its provisions are to be construed, but we may not assume that any provision is idle. It may be an exception to the general purpose, and the first presumption is that it means something."

In McKean v. Archer, 52 Fed. 791, at page 793, Baker, dist. judge, sitting in the Circuit Court of the District of Indiana, said:

> "It is the duty of courts to construe statutes so as to give effect to the entire language employed, where such a construction is practicable."

To the same effect see:

Petri v. Commercial National Bank, 142 U. S. 644 (35 Law Ed. 1144);

In re Mathews, 109 Fed. 603;

Bend v. Hoyt, 13 Pet. 263 (10 Law Ed. 154);

2 Lewis, Sutherland on Statutory Construction, Sec. 380, page 731.

The correct interpretation of the Act of 1877, however, so far as assignability of the entryman's rights prior to reclamation is concerned, does not depend wholly upon the construction to be placed upon the provision requiring the entryman to file declaration under oath that he intends to reclaim. Having recourse to the context of the act and to all of its provisions, we submit there is no difficulty in discovering the mind of congress upon this question. The same section of the act contains this further provision:

> "At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract in the manner aforesaid, and upon the payment to the received of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him."

To whom does congress refer in the sentence last quoted, when it says that within three years after filing said declaration, upon making satisfactory proof of reclamation and payment of the additional one dollar per acre, "patent for the same shall be issued to him?" The entryman is

the only individual required by the act to file any declaration. No other person is even referred to or mentioned in the act, and it seems too plain for discussion that he was the person who congress intended should make satisfactory proof of reclamation within three years of the filing of said declaration, and to whom, upon payment of the additional sum of one dollar per acre, patent should be issued. In other words, the intent of congress as clearly expressed in this act, was by the first provision to require the entryman, as one of the initial steps in his entry proceedings, to file his declaration under oath "that he intends to reclaim a tract of desert land * * * by conducting water upon the same within the period of three years thereafter;" and then, by the provision last above quoted, and as a condition precedent to patent, to require him to make proof of the fulfillment of his oath, by proving to the satisfaction of the register and receiver of the local land office at any time within three years after filing his said sworn declaration, that he, personally, had reclaimed the land in question in the manner prescribed by the statute. Whereupon he would be entitled to have patent issue to *him* (not to him or his assignee) upon the payment of the additional sum of one dollar per acre.

The language employed by congress in this act is unambiguous and plain, and the meaning is clear; hence there is no room for construction. It

is a well settled rule governing the interpretation of statutes that the intention of the law making body is to be gathered from the words of the statute, and where the phraseology employed is not ambiguous, but the language of the act is plain, the definitely expressed meaning must be recognized.

In the case of the United States v. Goldenberg, 168 U. S. 95 (42 L. Ed. 394) Mr. Justice Brewer said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Pirie v. Chicago Title & Trust Co., 182 U. S. 438, at page 451 (45 L. Ed. 1171, at p. 1179), Mr. Justice McKenna, speaking for the court, said:

> "It is but one rule of construction that the consequences of a statute may be considered

in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by that one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors."

Perhaps one of the most frequently quoted cases on this proposition is that of Lake County v. Rollins, 130 U. S. 662 (32 Law Ed. 1060) involving the interpretation of a certain section of the Colorado state constitution; Mr. Justice Lamar delivering the opinion, said:

"The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

"So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the legislature should be intended to mean what they have

plainly expressed and consequently no room is left for construction."

After having imposed upon the entryman, personally, the obligation to reclaim, and having demanded that before patent should issue to him he must make proof to the satisfaction of the register and receiver that he, the entryman, had fulfilled his sworn promise to reclaim, if congress had intended by the same act to permit the entryman to shift his sworn obligation upon an assignee or successive assignees (who, so far as anything to the contrary appearing in the act is concerned, may or may not have possessed the qualifications of an entryman) it very easily could and certainly would have used some language or expression in the act to indicate such intention. In cases where a construction of a statute was insisted upon not warranted by the plain and unambiguous language of the statute, and which would expand or contract the clear meaning of the legislature, the courts have repeatedly said that had the legislature intended to convey any such meaning "it would have been easy to say so."

In Farrington v. Tennessee, 95 U. S. 679 (24 L. Ed. 558) Mr. Justice Swayne, in construing certain provisions of a charter granted by the legislature of the state of Tennessee to the Union & Planters Bank of Memphis, said:

> "Our duty is to enforce the contract as we find it, and not to make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done. In the absence of this expression, we can find no evidence of such an intent."

In National Bank v. Mathews, 98 U. S. 627 (Law Ed.), it was said:

> "If congress so meant it would have been easy to say so, and it is hardly to be believed that this would not have been done."

In Austin v. United States, 155 U. S. 417, page 433 (39 Law Ed. 206, page 212) Mr. Chief Justice Fuller said:

> "This is not the case of the revival of a law by express re-enactment, or by the repeal of a repealing clause; and if such had been the intention of congress, no reason suggests itself why congress should not have unequivocally said so."

In U. S. v. Koch, 40 Fed. 250, Mr. Justice Brewer, sitting in the Circuit Court of the Eastern Dist. of Missouri, in construing certain acts of congress, said:

> "Again, when the Act of 1881 was passed, if congress had intended that penalty should be imposed for a trespass upon the rights conferred by that statute * * * it was very easy to say so. * * * And it must be assumed that if it meant * * * that any penalties should be imposed for violations of the law of 1881, it would have so stated."

In Louisville Trust Co. v. Cincinnati, 73 Fed. 716, Sage, district judge, in holding that a certain right was not conferred in the charter of a railroad company, at page 726, said:

> "If such was the intention of the legislature it would have been easy to express it."

In re Drake, 114 Fed. 229, page 232, Brawley, district judge for the District Court of South Carolina, said:

> "When the bankrupt act excepts from its operation persons 'engaged chiefly in farming or the tillage of the soil,' due effect must be given to the words. The act defines 'wage-earner' as an 'individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year,' and, if the intent was to limit the protection of persons engaged in agricultural pursuits to those only who were farming upon a small scale, it could easily have been done."

In Turner v. Turner, 108 Fed. 785, page 789, Baker, district judge, Indiana, in holding that a discharge in bankruptcy did not release the bankrupt from paying a fixed sum decreed by the court for the maintenance and support of his wife and child, said:

> "If money decrees for the enforcement of the marital or parental duty of support were intended to be included, it is difficult to understand why the law did not mention duties as well as debts. If congress intended to include money decreed for the support of the wife or child, it would have been easy to have used the words 'debts and duties.'"

The interpretation placed by this court in the Williams case (*supra*) and by the Interior Department from 1880 to 1891, upon the Act of 1877, to-wit, that the entry gave to the entryman no right that he could sell or transfer, harmonizes not only with the letter, but also with the spirit of the law. For, as we will hereafter show, it is the well defined policy of the government in disposing of its non-mineral lands to so frame its laws and its rules and regulations governing such disposal, as to guard against speculation in the inchoate rights springing from the initial proceedings of entry. On the other hand, to interpret the act as vesting in the entryman the right to sell or transfer the inchoate rights acquired by him by virtue of his initial entry, would not only be violative of the policy of the government, as above suggested, but would furthermore, necessitate either importing into the act some additional word or words expressive of the right to assign, or omitting therefrom the clause imposing upon the entryman the personal obligation to reclaim. But the courts have no right either to add or to omit words from a statute in order to change its plain meaning. In Newhall v. Sanger, 92 U. S. 765 (23 L. Ed. 769) a case in which this court was called upon to construe a federal statute in which the words "lands claimed under any foreign grant or title" occurred, and in which it was claimed that the

word "lawfully" should be read before "claimed," it was said:

> "There is no authority to import a word into a statute in order to change its meaning."

In Folsom v. United States, 160 U. S. 121, p. 127, (40 L. Ed. 363) the Supreme Court said:

> "Doubtless in some cases where the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, but where the intention is plain, it is the duty of the court to expound the statute as it stands."

In U. S. v. Temple, 105 U. S. 97 (25 Law Ed. 967), Mr. Justice Woods said:

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction, for the purpose of either limiting or extending its operation. Waller v. Harris, 20 Wend. 561; Pott v. Arthur (*ante*, 909), decided at the present term. When the language is plain we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."

In Northern Pacific R. Co. v. U. S. (36 Fed. 282), the question was whether a certain joint resolution of congress gave to the plaintiff an additional ten mile indemnity limit. The court said:

47

> "The word 'place' must be interpolated before the word 'limits' in order to make it express the meaning claimed. Of course it is familiar learning that a word may be interpolated or suppressed if it be necessary to make the language harmonize with the obvious intent of the law-maker. But I know of no rule of construction which permits us to beg the intent, and then interpolate or suppress a word to carry out such intent. Rather is it to be presumed that the very language was used which expresses the intent."

We have thus considered at length the question of the assignability of desert land entries under the Act of 1877, because, in the court below, counsel for the government argued that, independent of any language contained in the Desert Land Act, as amended in 1891, expressly recognizing such right of assignment, such entries are assignable for the reason that their assignment is not expressly prohibited by the statute. If, however, our contention is correct that the provisions of the Act of 1877 impose upon the entryman the personal obligation to reclaim before he becomes vested with any right which he can assign or transfer, then it necessarily follows that that act does in effect prohibit such assignment before reclamation. And it only remains to consider whether the amendatory Act of 1891 changed or amended the law in that particular by making desert land entries assignable.

SECOND POINT.

DESERT LAND ENTRIES ARE NOT MADE ASSIGNABLE PRIOR TO RECLAMATION AND FINAL PAYMENT BY THE AMENDATORY ACT OF 1891.

I.

Intent to amend, modify or repeal any provision of the Act of 1877 must be made clearly to appear by the terms of the amendatory act.

It must be assumed that at the time of passing the amendatory act of 1891, congress was aware of and had in mind the construction put upon the Act of 1877 by the courts and by the uniform rulings of the Land Department from 1880 to that time, to the effect that the entryman acquired no rights before reclamation which he could sell or transfer. And if it was the intent of congress by the Act of 1891 to so amend the former act as virtually to strike from it or repeal that limitation, it must have manifested that intention in clear and unmistakable language. As said in Turner v. Turner, 108 Fed. 785, at page 738:

> "The change in the language of the present statute from that employed in the former statutes does not necessarily require a change of construction. The difference of language ought to be so clear and distinct as to evince a manifest intention to change the law so that the interpretation given to former

> statutes relating to the same subject matter should be clearly inapplicable in the construction of the later statute."

In 36 Cyc. 1153, the law is stated thus:

> "Where a statute that has been construed by the courts has been re-enacted in the same, or substantially the same, terms, the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction."

In U. S. v. Healey, 160 U. S. 136 (40 L. Ed. 369) Healey made a desert land entry in the land office at Visalia, California, in 1889. The lands entered constituted one of the alternate sections reserved along the line of railroad for the construction of which provision was made by act of congress. At the time of filing his declaration, upon request of the local land officers, he paid fifty cents per acre for the lands included in his entry; thereafter in 1891, he made final proof, and at that time paid two dollars per acre; in all, $2.50 per acre. A patent was thereupon issued to him. The action was to recover from the government the excess over $1.25 per acre he had paid for the land. The question presented was, whether the Act of 1877 providing for the sale of desert lands, embraced alternate sections reserved to the United States along the line of railroads for the construction of which congress had made land grants. Up to the time of the revision of the

statutes of the United States, it was the settled policy of the government, as shown by many enactments, to hold for sale at a price not less than double minimum, all alternate reserved sections along the lines of railroads constructed with the aid of the government. That policy was incorporated in section 2357 R. S., which, among other things, provides:

> "The price at which the public lands are offered for sale shall be $1.25 an acre. * * * Provided, that the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of congress shall be $2.50 per acre."

Such was the law when the Act of 1877, providing for the sale of desert lands at $1.25 per acre, was passed. Mr. Justice Harlan, delivering the opinion of the court, said:

> "Did the Act of 1877 supersede or modify the proviso of U. S. Rev. Stat. Sec. 2357, which expressly declared that the price to be paid for alternate reserved lands along the line of railroads within the limits defined by any act of congress, should be $2.50 per acre? The principal, if not the only, object of the requirement that the alternate reserved sections along the lines of land-grant railroads should not be sold for less than double the minimum price fixed for other public lands, was to compensate the United States for the loss of the sections given away by the government.
>
> "The Act of 1877 and the proviso of U. S. Rev. Stat. Sec. 2357, both relate to public lands; the former, to desert lands, that is,

such lands—not timber and mineral lands—as required irrigation in order to produce agricultural crops, and the price for which was $1.25 per acre; the latter, to such lands, along the line of railroads, as were reserved to the United States in any grant made by congress, and the price for which was $2.50 per acre. As the statute last enacted contains no words of repeal, and as repeals of statutes by implication merely are never favored, our duty is to give effect to both the old and new statute, if that can be done consistently with the words employed by congress in each. * * *

"In the absence of some declaration that congress intended to modify the long-established policy indicated by the proviso of U. S. Rev. Stat. Sec. 2357, we ought not to suppose that there was any purpose to except from that proviso any public lands of the kind therein described, even if, without irrigation, they were unprofitable for agricultural purposes. To hold that alternate sections along the lines of a railroad aided by a grant of public lands, being also desert lands, could be obtained, under the Act of 1877, at $1.25 per acre, would be to modify the previous law by implication merely. In Frost v. Wenie, 157 U. S. 46, 58 (39: 614, 619), we said: 'It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and

> so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute.' Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the Act of 1877 did not supersede the proviso of U. S. Rev. Stat. Sec. 2357, and therefore did not embrace alternate sections reserved to the United States by a railroad land grant."

In United States v. Hampton, 101 Fed. 714, the defendant was indicted for perjury in making a false oath before a special examiner of the pension bureau, in a material matter touching his claim for pension, by stating under oath that he was not in the Confederate army during the rebellion. He was tried and convicted; whereupon he moved in arrest of judgment upon the ground that the statement was not material, for the reason that his application for a pension was under the Dependent Pension Act of 1890, and that the section 4716 R. S., which prohibits the payment of any money to any person, who in any manner engaged in or aided or abetted the late rebellion, was by implication repealed by said Act of 1890, in so far as it related to pensions granted under said Act of 1890. Defendant's motion was granted; the United States prayed a writ of error to the Circuit Court of Appeals, Fourth Circuit. That court, in reversing the order, said:

> "This Act of June 27, 1890, was a short act, of four sections, the purpose of which

> was to enlarge the existing acts so as to give a pension to United States soldiers and sailors of the War of the Rebellion who were incapacitated to such a degree as to be unable to earn a support, and also to provide pensions for their widows, children, and dependent parents. It does not in express terms repeal any existing acts,—not even those inconsistent with it. It simply enlarges the class of persons who may obtain pensions, and guardedly refrains from affecting any existing laws with regard to pensions. It is not possible to argue that it covers the whole subject of the prior existing laws, and was intended as a substitute for them. * * * It is familiar law that repeals by implication are not favored, and that such an implication arises only where there is positive repugnance between the new law and the old, and then only to the extent of the repugnancy."

In Chicago M. & St. P. R. Co. v. United States, 127 U. S. 406 (32 L. Ed. 180), Mr. Justice Field said:

> "When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act."

Is there in the Act of 1891, anything to indicate, clearly or otherwise, any intention on the part of congress to change the interpretation placed by the courts and the Land Department upon the Act of 1877 by removing or repealing its provisions, so far as they limit the right of alienation before reclamation and final payment? Or is there anything in the subsequent act positively repugnant, or repugnant at all, to those provisions of the former act, or to the interpretation placed thereon by the courts and the Land Department? The Act of 1891 plainly does not change or modify the provision requiring the entryman to file a declaration under oath that he intends to reclaim. On the contrary, section 4 of the amendatory act not only expressly continues that provision of the former act in force, but adds to the conditions and requirements which shall accompany the filing of the declaration required by the former act.

II.

Section 4 of the Act of 1891.

Under section 4 the entryman must not only make and file the declaration required by the former act, but he must at the same time file a map "which shall exhibit a plan showing the mode of contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land," etc. So here congress, in addition to

the sworn declaration of his intention to reclaim, demands further evidence of the good faith of the entryman by requiring him to show that the land may be reclaimed and the means by which he proposes to accomplish its reclamation. Section 4 further provides:

> "Persons entering or proposing to enter separate sections or fractional parts of sections of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements."

There is nothing here to indicate that the *assignees* of persons entering may associate, but it is only persons entering or proposing to enter who may associate. And for what purpose? Not simply for filing joint map or maps, but in the construction of canals, etc., thus evidencing the intention that the "persons entering" are the ones required by the act to construct the canals, etc. This construction is in harmony, as we have shown, with the Act of 1877.

III.

Section 5 of the Act of 1891.

Section 5 of the Act of 1891 further demonstrates our contention that congress had no intention by that act to change the conditions of the former act in respect to right of assignment or alienation by the entryman before he had re-

claimed and earned patent or to give to the entryman any different or greater rights of assignment than he possessed before. For convenience we quote the section in full:

> "That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall pre-

vent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, that proof be further required of the cultivation of one-eighth of the land."

Section 1 of the old act and section 4 of the Act of 1891, prescribe the acts and things to be done in the initial proceedings or entry; section 5 of the Act of 1891 amends and supplements section 1 of the former act in respect to what shall constitute reclamation, the time and the manner in which reclamation shall be accomplished, the proofs required, and result following failure to comply with these requirements. And, as if to accentuate the demand of the Act of 1877 that the entryman shall personally fulfill the promise made in his sworn declaration, section 5 provides: *"The party entering"* shall within one year after entry expend not less than one dollar per acre for the purposes aforesaid; and *"he"* (the party entering) shall in like manner expend one dollar per acre the second and also during the third year; *"said party"* (the party entering) shall file during each year proof that such expenditure has been made and the manner in which expended, and at the end of the third year shall file a map showing the character and extent of such improvements. "If any *party* (so

entering) who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert," etc. Throughout, the section speaks only of the "party so entering" in connection with the things to be done to constitute reclamation. As was said by the learned district judge [Tr. fol. 35]:

> "Thus, it will be seen that all of the requirements of the section as to expenditures are laid expressly upon the entryman, and that they are, of course, utterly incompatible with a right to assign before the requirements are fulfilled. From this conclusion there is no escape."

And if congress had intended to change or amend the act in the particular contended for by the government, it would have done so by plain, direct and apt language to that effect. It will be noticed that in all of the other particulars in which congress undertook expressly to amend the former act, the language chosen to express such amendments is clear and unambiguous; and if it had been the intention to amend the law in respect to the right of the entryman to assign, congress would not have left its intention in that particular any more than in any other, to be drawn from possible inference or strained construction of the language employed. Had such been the intention of congress, the last sentence of section 4 would have been made to read:

> "Persons entering or proposing to enter separate sections or fractional parts of sections of desert lands, *or the assigns of persons so entering*, may associate together in the construction of canals," etc.

And in section 5, to quote again from the opinion of Judge Wellborn, [Tr. fol. 36]:

> "It would have inserted after each reference to the 'entryman,' in some appropriate way, the words 'or his assigns.' Nor can it be said that the failure to make these insertions was inadvertent because the use of the words 'or his assignors,' in the second line of the section, shows unmistakably that congress had that matter specifically in mind."

Furthermore, the Act of 1891, like the Act of 1877, contains no requirement that an assignee shall make oath of his intention to reclaim, nor does it specify any qualifications which shall be possessed by an assignee. Indeed it appears from the rulings of the Land Department that under the Act of 1877 and the amendatory Act of 1891, the assignee need not possess the qualifications of an original entryman. In the case of Fred W. Kimball, 20 L. D. 67, it was said by Secretary Smith:

> "From what has been said hereinbefore in regard to the word 'entry,' as used in the statute and amendment, it will be seen that it applies only to original entry, and that the qualifications of those entitled to make entry, as prescribed by section 8, does not include the assignees of any entryman in the matter of making final proof."

Can it be reasonably assumed that congress would be so particular concerning the qualifications and intention of the entryman, if, by the same act, it intended to permit him immediately after making his initial entry, to assign and transfer the rights thereby acquired to another, regardless of the qualifications or intention of that other? The only provision in the amendatory act regarding qualifications is to be found in section 7, where it requires the applicant for patent to prove that he or she is a citizen of the United States, and this proof is required whether the applicant for patent be the original entryman or his assignee. If the contention of counsel for the government is correct, there may have been intervening between the entryman and the applicant for patent a half dozen assignees, none of whom may have possessed any of the qualifications required of the original entryman. Why, then, if that be the law, should congress require the entryman to possess certain qualifications and intention, and pay no regard to the qualifications or intention of those subsequent assignees? It seems to us that this alone is sufficient to clearly demonstrate that congress had no intention of permitting such assignments as here contended for by the government.

It is contended, however, by opposing counsel, that the words "he or his assignors" in section 5 clearly indicate the intention of congress to vest

in the entryman the right of alienation prior to completed reclamation and final payment. They argue (pages 49 to 57 inc., brief of Messrs. Eshelman and Trippet, *Amici Curiae*) that the antecedent of the pronoun "he" is "assignee" or "claimant"; and endeavor to demonstrate the correctness of their interpretation by substituting the selected antecedent for the pronoun, as follows:

> "That no land shall be patented to any person under this act unless *the assignee* or his assignor shall have expended," etc.

This construction, however, begs the very question here at issue, in that it assumes as a fact that congress recognized in the entryman an existing right to assign his entry before making the necessary expenditures to entitle him to patent. But we have shown that the entryman possessed no such right under the Act of 1877, and in the absence of explicit language in the Act of 1891 expressing the clear intention on the part of congress to repeal or modify that limitation in the Act of 1877, it can not be said that the amendatory act vests the entryman with such right of alienation. Furthermore, the construction contended for by counsel is not in harmony, as we have seen, with the provisions of section 4 of the same act expressly continuing in force the requirement of a declaration under oath of intent on the part of the entryman to reclaim, etc., nor

does it harmonize with the plain language of section 5 immediately following the sentence in question. For in the following sentences congress in definite language designates "the party so entering" as the one upon whom is imposed the burden of reclamation. Hence, in order to give to the section the construction urged by opposing counsel, it would be necessary not only to import into the first sentence of that section, as antecedent of "he" a word entirely foreign to the plain meaning of the language employed, but also to incorporate into the balance of the section, as suggested by Judge Wellborn [Tr. fol. 23], the words "or his assigns" after each reference to "the party so entering." The court, however, will not insert words or phrases into a statute so as to give it a different meaning from that conveyed by the plain and unambiguous terms employed by the legislature. As said by Mr. Justice Brewer, in Newhall v. Sanger, 92 U. S. 795:

> "Of course it is familiar learning that a word may be interpolated or suppressed if it be necessary to make the language harmonize with the obvious intent of the lawmaker. But I know of no rule of construction which permits us to beg the intent, and then to interpolate or suppress a word to carry out such intent. Rather it is to be presumed that the very language was used which expresses the intent."

What we have said with respect to the word "assignee" as the antecedent of "he" applies

equally to the word "claimant," as such antecedent, when used in the sense suggested on page 58 of same brief, to-wit: "When one person is substituted by assignment for another person, that substituted person becomes the claimant." The fallacy of this construction is clearly shown in the following language of Judge Wellborn: [Tr. fol. 22.]

> "The government's contention, so far as it rests upon section 5, assumes, among other things, that the pronoun 'he' in the clause 'he or his assignors,' refers only to an assignee. This assumption, although seemingly fair, if we restrict our view to the clause itself, is manifestly wrong when the clause is read, as it should be, in the light of its context. Suppose a case where there has been no assignment, but the entryman himself has fully completed the work of reclamation, and applied for a patent. 'He' would necessarily mean the entryman, and could not refer to an assignee, because there is no assignee. So that the character of the person to whom 'he' refers depends upon the circumstances of each case. If there has been no assignment, but the work of reclamation is accomplished by the entryman who applies for patent, then, as I have just shown, 'he' can not refer to an assignee."

We do not think "claimant" can be construed to be the antecedent of "he," for the further reason that claimant as used in section 5 means "entryman," i. e., the person filing or initiating the "claim." This is apparent from the use of the

words "claim" and "claimant" in section 6, to wit: "But all *bona fide claims* heretofore lawfully initiated may be perfected in compliance with the provisions of said act," etc., also "or said *claims*, at the option of the *claimant*, may be perfected and patented under the provisions of said act," etc.

But we submit that the language of the opening sentence of section 5, even when taken alone and not read in the light of the context, is too clear to admit of doubt, or to give occasion for construction. It will be noticed that in this sentence congress is speaking of the person to whom land will be patented, and the antecedent of the pronoun "he" is plainly "person," in the line above, i. e., the person applying for patent. This becomes at once apparent if we adopt the rule suggested by opposing counsel, and substitute the antecedent for the pronoun. The sentence would then read: "That no land shall be patened to any person under this act unless *such person* or his assignors shall have expended," etc. It is conceded that after the entryman has acquired the equitable title to the land embraced within his entry, he may assign and by section 7 of the act, his assignee may apply for and obtain the patent, "so that the character of the person to whom he refers depends upon the circumstances of each case." The entryman himself may be the "person" applying for patent in which event "he" will

refer to entryman; or, the entryman, after having acquired the equitable title, may have assigned and the assignee have applied for patent, in such event "he" would refer to such assignee. This construction bears out the plain meaning of the words employed, and harmonizes not only with the balance of that section, but with the entire act and with the former act with which the amendments of 1891 are in *pari materia.*

Messrs. Eshelman and Trippet are in error in assuming at page 56 of their brief that "It is claimed by the defendant and is decided by the court below that 'he' in this sentence means 'the party so entering.'" Our contention has always been, as here argued, viz: That the antecedent of "he" is "the person applying for patent," whether such person be the entryman or someone to whom the entryman has assigned, but that the entryman can not make such assignment until after he has earned the equitable title. And, we submit that even a cursory reading of Judge Wellborn's opinion will clearly show that he entertained the same view. His language upon this point can not be misunderstood. He says:

> "So that the character of the person to whom 'he' refers depends upon the circumstances of each case. If there has been no assignment, but the work of reclamation is accomplished by the entryman who applies for the patent, then, as I have just shown, 'he' can not refer to an assignee. If, however, the entryman, after completing the

work of reclamation, assigns his entry, then the word 'he' must refer to an assignee." [Tr. folio 22.]

It is further contended by Messrs. Eshelman and Trippet, pages 51 *et seq.* of their brief, that since all of the things provided in Section 5 of the Act of 1891 to be done, must be done before equitable title vests, and must be done by a party or parties who can legally hold the land before equitable title vests, if it be possible for more than one person to participate legally under the act in doing those things, then it follows that the act plainly allows transfers before equitable title vests. They then argue that because section 5 of the Act of 1891 says that no land shall be patented to any person unless he or his *assignors* shall have done the things necessary to establish equitable title,—the word "assignors" being used in the plural—it plainly appears that this language contemplates or allows the participation in those acts of more than one person; that the statute, in terms, permits "assignors" to participate in acts which must be done before equitable title vests, that assignors means at least two and may mean any number, and therefore in order for there to be more than one assignor before equitable title vests, there must have been at least one assignment before such time. Hence, they conclude that there is no escape from the construction

of the section insisted upon by them. The fallacy of this argument lies in the assumption that an applicant for patent can not have "assignors" who participate in the acts precedent to equitable title, except in cases where assignment or assignments have been made prior to that time. If there were no conditions, under the law as we view it, wherein an applicant for desert land patent could have had "assignors" in respect to the land he is seeking to obtain patent for, there might be some force to counsel's argument. But prior to the Act of March 3, 1908, entitled "An act limiting and restricting the right of entry and assignment under the desert-land law and authorizing an extension of time within which to make final proof," (35 Stat. L. 52), it was the recognized practice of the General Land Office to issue patent to an applicant who had taken assignments of more than one entry, as well as where a person made an entry and also took one or more entries by assignment, the aggregate area of the land embraced in all such entries not exceeding 320 acres, which is the maximum amount allowed to one person. In a circular issued by the General Land Office, November 30, 1908, and approved by Secretary Garfield, entitled "Statutes and regulations governing entries and proofs under the desert-land laws (37 L. D. 312), at page 6, under the title "Assignments," it is said:

"However, under the practice recognized by the General Land Office, where assignments were taken of more than one entry or where a person made an entry and also took one or more entries by assignment, the aggregate area of the land embraced in all such entries not exceeding 320 acres, such assignments and entries will not be disturbed. But all assignments and entries made subsequent to the approval of the Act of March 28, 1908, must be governed by the terms of that act, which is held to mean that the desert-land right is exhausted either by making an entry or by taking one by assignment."

In recognition of the right of an applicant for desert-land patent to acquire the land embraced within his application by taking assignment of more than one entry, the General Land Office in its circular issued July 11, 1890, entitled "Circular from the General Land Office, showing manner of proceeding to obtain title to public lands under Homestead, Desert Land and other laws," set forth at page 296, the form of affidavit required of parties appearing as assignees of original entrymen, wherein, among other things, such party states:

"And further, that I do not hold by assignment or otherwise more than three hundred and twenty acres of land entered under said acts, the only lands so held by me being described as follows, and being embraced in the *entries* as follows, viz.————; that since August 30, 1890, I have not entered under the land laws of the United States, or filed

> upon, nor has there been assigned to me a quantity of land, agricultural in character, and not mineral, which, *with the tract now assigned,* would make more than three hundred and twenty acres." (Italics ours.)

In Bone v. Rockwood, decided by Hon. Frank Pierce, First Asst. Secretary, contest was filed against a certain entry taken by Rockwood, on the ground that he already held by assignment another desert land entry, and thereby had exhausted his rights; and the Hon. Assistant Secretary, after quoting the above regulation of November 30, 1908, said:

> "Under said regulations, therefore, it would appear that the assignment to Rockwood would not be open to the objection made in your letter of January 16, 1908, and if no other objection appeared, the assignment would not be disturbed."

Also in a recent ruling by Commissioner Fred Dennett, in the case of David G. Henderson (L. D.), it was said:

> "However, under the practice of the General Land Office, where assignments of more than one entry were taken, or where a person made an entry and also took one or more entries by assignment, the aggregate area not exceeding 320 acres, the entries would not be disturbed."

Such was the interpretation placed upon the law by the Department of the Interior, until the passage of said Act of March 28, 1908. It is

true the foregoing authorities apply to assignments made before the vesting of equitable title, as permitted by the Land Office since 1891, as well as to those made after; but that is not material so far as this point is concerned. It is sufficient for our purpose to show that an applicant for patent may have had "assignors" without their necessarily having been assignors of the same entry. If, prior to 1908, A had applied for patent for 320 acres of desert land, 160 acres of which he had acquired by assignment from B after B had earned the equitable title, and the other 160 from C after C had earned the equitable title thereto, he plainly would have had two assignors, but neither of them would have participated in earning the equitable title to more than one entry. Therefore it does not necessarily follow from the use of the word "assignors" in section 5, that the law must contemplate assignments before the vesting of equitable title.

It is further contended by opposing counsel (Messrs. Eshleman and Trippet's brief, p. 57) "that the entering of the land means the whole process from beginning to end, by which a final certificate is obtained. Therefore 'the party so entering' may mean at any time during the progress of reclamation and purchase, different persons, who become different claimants." But the meaning of the word "entry" as applied to the

public lands has been judicially determined in numerous decisions.

In Chotard *et al.* v. Pope *et al.*, 12 Wheat. 586 (6 L. Ed. 737) Mr. Justice Johnson, discussing the meaning of the word "entry," said:

> "The term *entry*, as applied to appropriations of lands, was probably borrowed from the state of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this court, in which the title to western lands were drawn in question, which will show how familiarly and generally the term is used by court and bar. Its sense, in the legal nomenclature of this county, is now as fixed and definite as that of many terms borrowed from the common law. It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land-offices, under the acts of the United States. In the natural progress of language, the term has been introduced into the laws of the United States; and, by reference to those laws, we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States, at private sale."

In Sturr v. Beck, 133 U. S. 541 (33 L. Ed. 761), Mr. Justice Fuller, speaking of what constitutes entry of public lands, said:

> "A claim of homestead settler, such as Smith's, is initiated by an entry of the land,

which is effected by making application to the proper land office, filing an affidavit and paying the amounts required by sections 2238 and 2290 of the Revised Statutes."

In Denny v. Dodson, 32 Fed. 899, Mr. Justice Field, sitting as Circuit Justice for the Ninth Circuit, said, at p. 910 of the opinion:

> "'It' (the term entry) is used to designate the initiatory proceeding taken for the acquisition of a portion of the lands of the United States which are open to private sale." Citing with approval Chotard v. Pope, *supra.*

Northern Pacific R. Co. v. Sanders *et al.*, 47 Fed. 604, at p. 607, quotes the definition given by Judge Johnson of the word "entry" in Chotard v. Pope.

In U. S. v. Four Bottles Sour Mash Whiskey, 95 Fed. 720, at page 723, it is said:

> "The word 'entry,' as it has been heretofore used in the land laws of the United States, means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim."

McGuire v. Brown, 106 Cal. 666;

Hastings etc. R. R. Co. v. Whitney, 132 U. S. 357.

In 32 Cyc. 806, it is said:

> "The term 'entry,' as used in reference to public lands, means, in its technical sense, the filing with the register of the land office

> of a claim to a portion of the public lands for the purpose of acquiring an inceptive right thereto."

In the light of the above authorities, "entering" desert land means the taking of the initiatory steps prescribed in section 1 of the old act as amended by section 4 of the Act of 1891; and "the party so entering" is necessarily the entryman, and can not mean any person who may acquire the entry by assignment at any time during the progress of reclamation. And such is the holding of the Land Department in case of Fred W. Kimble, 20 L. D. 67.

IV.

Section 7 of the Act of 1891.

Section 7 of the Act of 1891 prescribes the final steps in the proceedings leading to the acquisition of the legal title to desert lands. The first part of section 1 of the Act of 1877 and the amendments in section 4 of the Act of 1891, provide what things are to be done by the person seeking to acquire desert lands in order to make a valid entry. The word "entry," as used in the Act throughout, undoubtedly means the proceedings constituting the initial entry, to wit, the filing of the declaration under oath, map, etc. Valid entry having been made, section 5 carries the entryman through the period of reclamation and cultivation; requiring proof year by year that he, "the

party so entering," has made the necessary expenditures and the manner in which the same were made. Section 7 takes up the proceedings after reclamation has been accomplished in the manner provided by section 5, and in substantial accordance with the plans provided for by section 4, and provides when, under what conditions and to whom patent shall issue. Before patent shall issue, it must be proven to the satisfaction of the register and receiver that the land has been reclaimed and cultivated to the extent and cost and in the manner aforesaid, and in accordance with, "the plans provided for." The extent, cost and manner aforesaid are all found in section 5, and consist of the expenditure of not less than one dollar per acre per year by the party so entering, for three years, and the construction of canals, branch ditches and permanent improvements, purchase of water rights for irrigating the land, and the cultivation of at least one-eighth of the land. The "plans herein provided for" are those required by section 4 to be filed by "the party," i. e., the entryman, when making the entry. All of these things are, by the express terms of the statute, imposed upon the entryman. They must be done by "the party so entering"; that is the clear, positive language of sections 4 and 5, and was and is in strict harmony with the sworn declaration exacted of the entryman when making his initial entry. If the *entryman* does

not make these expenditures to the extent, cost, and in the manner aforesaid, and make due proof thereof, *he* forfeits the twenty-five cents paid, and his entry is cancelled. He therefore has nothing which he can assign until all of the requirements of sections 4 and 5 have been personally fulfilled by him, and due proof thereof made. This being so, the word "assigns" in section 7 must refer to a person or persons to whom the entryman has assigned after he has completed the work of reclamation and cultivation, and paid the additional one dollar per acre. He has then earned the patent and acquired the equitable title to the land, and may assign and transfer that equitable title to any person or association of persons before obtaining the patent.

Hawley v. Diller, 178 U. S. 476 (44 L. Ed. 1157);

Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428 (36 Law Ed. 762);

Quinby v. Conlan, 104 U. S. 420 (26 Law Ed. 800);

Defflebach v. Hawk, 115 U. S. 393 (29 Law Ed. 423);

U. S. v. Freyburg, 32 Fed. 195.

It is not necessary, however, that such assigns of the entryman shall possess all of the qualifications required of the entryman himself. (See section 8 and the case of Fred W. Kimball, 20 L. D. 67.) Patent may be issued directly to such assigns.

We submit, in view of all that has been said hereinbefore, in reference to the real intent and meaning of the Acts of 1877 and 1891, that when read together they present a clear, consistent, certain and unambiguous plan or scheme which must be pursued in order to acquire the title to desert land. First, we have the entryman required to make a declaration under oath that he intends to reclaim. Second, he is required at the time of making that declaration also to file a map exhibiting a plan or mode of contemplated irrigation which will be sufficient to thoroughly irrigate and reclaim the land and prepare it for ordinary agricultural crops. Third, he is required, from year to year during the period of irrigation, to prove to the satisfaction of the officers of the land office that he, personally, is doing the things which he declared under oath it was his intention to do, and which he filed his map or plan for. Fourth, he is then required, in order to establish his claim to the patent, to make proof that he has done all of those things required of him and then and not until then has he acquired a right which he is entitled or at liberty to sell, assign or transfer.

To construe the Act of 1891 as giving to the entryman the right to assign at any time after making his initial entry, necessitates, as we have shown before, importing into the act words which entirely change the meaning from that conveyed

by the clear language employed, and if it was the intent of congress in said act to legislate concerning the assignability of the entryman's rights and expressly to give such right to the entryman where he would not have it under the Act of 1877, it is the only instance in the entire Act of 1891 where the intent to amend is ambiguously or uncertainly expressed or left to inference or construction.

We think the conclusion is imperative that there was no purpose or intent by the Act of 1891 to alter or change the law in respect to the right of assignment, but that congress used the words "or his assignors" in section 5 and "or his assigns" in section 7 only in recognition of the right that every entryman has under any of the public land laws of the United States to make assignment after he has acquired the equitable title to the lands embraced within his entry, and that the words were used, not for the purpose of creating a right, but only "as one incidental reference to a right already existing."

The language of subsequent enactments by congress relating to desert lands bears out the construction that we have placed upon the Acts of 1877 and 1891 respecting the obligation of the entryman, personally, to reclaim the land.

The Act of August 4, 1894 (28 St. L. 226), 3 Comp. Stat. 901, p. 1552, provides:

"That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof may be made in each case is hereby extended to five years from the date of filing the declaration; and the requirement that *the persons filing such declarations* shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with: Provided, that within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and *in the manner provided by existing law*, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as herein provided."

The Act of June 27, 1906, entitled "An Act providing for the subdivision of lands entered under the reclamation act and for other purposes," 34 St. L. 520, provides:

"Section 5. That where any *bona fide* desert-land entry has been made embraced without the exterior limits of any land withdrawal or irrigation project, under the act entitled * * * and a desert-land entryman has been or may be directly or indirectly hin-

dered, delayed or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the *desert-land entryman* has been or may be so hindered, delayed or prevented from complying with the desert-land law shall not be computed in determining the time within which *such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert land entry.*"

And throughout the entire act it speaks of the desert land entryman as the one required to do the acts constituting reclamation.

Also section 3 of the Act of March 28, 1908, 35 St. L. 52, which reads as follows:

"Section 3. That any *entryman* under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that *he has in good faith complied with the terms, requirements, and provisions of said acts*, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, *he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts*, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, *within which to furnish proof, as required by said acts, of the completion of said work.*" (Italics are ours.)

Section 2 of this Act of March 28, 1908, does in express terms, recognize assignment of an entry, but we submit that the assignment therein referred to is such assignment as the law contemplates, viz., an assignment after the completion of reclamation, and not before. The language in section 3 above quoted, and particularly the parts italicized, must be read in connection with section 2 of the same act, and in connection with the entire act, and when so read, clearly demonstrates that congress was, by said act, legislating with reference to assignments that were recognized and permissible under the law, viz., assignments made after the completion of reclamation, and that it was not intended thereby to create a new right or to define or interpret the character of assignments that were permitted, but simply referred to such rights of assignment as existed under the law as it stood.

Since the ruling of Judge Wellborn in this case, congress has passed a remedial statute applicable only to Imperial county, state of California, approved June 25, 1910, entitled "An Act for the relief of assignees in good faith of entries of desert land in Imperial county." This act was plainly designed to relieve innocent purchasers, for value and without notice, of desert land entries situated in Imperial Valley, state of California, from the effect of the principle announced in Hawley v. Diller, 178 U. S. 477 (44 Law Ed.

115) and other cases, that purchasers from an entryman before issue of patent are not *bona fide* purchasers who are protected against the cancellation of their entry, on the ground of the fraud of the entryman. The act is not one of general application, but is, by its terms, confined to Imperial Valley, California, and was passed after the filing of the indictment in the case at bar, and after the ruling of Judge Wellborn on the demurrer filed by defendant to the indictment, holding that desert-land entries are not assignable prior to reclamation. It must therefore be construed with reference to the object it intended to accomplish and the remedy it intended to provide, as said in Stewart v. Bloom, 11 Wall. 493 (20 Law Ed. 176) in considering a remedial statute:

> "The courts must consider the evils which existed, the remedies prescribed, the objects to be accomplished, and the intention and considerations by which the law makers were governed."

If it had been the intention of the lawmakers at the time of passing this remedial act, knowing as they must be presumed to have known, of the ruling of Judge Wellborn in the Hammers case, to give a legislative interpretation to the provisions of the desert land laws respecting assignment, and to settle once and forever the question as to whether such entries could be assigned un-

der those laws prior to reclamation, they would certainly have taken this occasion to express such intention in plain and apt language, and thereby forever after remove all doubt. We respectfully submit, therefore, that this remedial act can not be taken as expressive of any intent on the part of congress to indicate the correct interpretation to be placed upon the desert land laws with respect to the right of assignment.

We submit that the fair interpretation of these acts bears out the intent of congress as indicated in the Acts of 1877 and 1891 that the entryman, personally, was the one upon whom was laid the obligation to reclaim. It has been repeatedly held that the construction of a statute by the legislature, as indicated by the language of subsequent enactments, is entitled to great weight.

It has been contended that the language in section 7, "no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of such arid or desert land," is intended to apply to the time anterior to the vesting of the equitable title; that the words, "prior to issue of patent" mean merely "prior to the vesting of the right to patent." And in support of this, cases are cited construing similar clauses in other statutes with respect to the right of the owner of the equitable title to transfer or assign his interest after the acquisi-

tion of the equitable title and before patent has really issued.

But the purpose of the limitation in section 7 is not in any manner to curtail or affect the rights of the entryman concerning *the land embraced in his entry*, after he has acquired the equitable title and earned the patent. He may sell it and in every respect treat it as his own and enjoy the benefits of such ownership. The limitation only prevents him or his assigns from obtaining patent to *more* than the maximum amount of desert land one person can enter.

Prior to the Act of 1891, there was no occasion for such limitation, because under the Act of 1877 patent could issue only to the entryman, the language of that act being:

> "At any time within the period of three years after filing said declaration, upon making said proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding 640 acres to any one person, a patent for the same shall be issued to him."

It was held in the case of Henry W. Fuss, 5 L. D. 167, by Mr. Secretary Lamar, that while the Act of 1877 did not permit assignments before reclamation, yet in view of the fact that until 1880 such assignments had been recognized by the department, therefore, in cases of assign-

ments made prior to 1880, they should be recognized, but *"patent to issue in the name of the original entryman."* And by the rules and regulations of the general land office, as announced in a circular issued by the general land office July 11, 1899, entitled "The manner of proceeding to obtain title to public lands under the homestead, desert-land and other laws," at page 94, under the caption "Land Patents," is the following regulation:

> "Patents for lands entered or located under general laws can be issued only in the name of the party making the entry or location, or in case of his death before making proof, to the statutory successor making the proof as provided by law."

But section 7 of the Act of 1891 expressly amends the Act of 1877 in this particular, by providing that upon making the final proof and paying the additional one dollar per acre, "patent shall issue therefor to the applicant *or his assigns.*" Patent, therefore, under this act may issue direct to the assignee; and were it not for the limitation in the act restricting the number of acres for which patent could issue to one individual or association of persons, patent rights to thousands of acres might be embraced in one patent to one person or association. The obvious purpose of the limitation, we think, is to prevent as far as possible, such monopoly of the lands in question. There

could be no purpose in inserting in the Act of 1891 a limitation upon the number of acres that patent would issue for to one person or association of persons, if it was intended to apply only before the right to patent had vested, and not after; because such limitation was already imposed by existing law upon the entryman. The Act of August 30, 1890, Chap. 837, 26 St. L. 391, provides as follows:

> "No person who shall, after the passage of this act, enter upon any of the public lands with a view of occupation, entry or settlement, under any of the land laws, shall be permitted to acquire title to more than 320 acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act."

And if, as contended by opposing counsel, the assignee before reclamation only steps into the shoes of the entryman, then such assignee is charged with the same duties and obligations as are imposed upon the entryman, and likewise controlled by the same limitations as restrict the entryman.

Point is made that the words "assignment," "assignors" and "assigns" are not apt words to designate transfer of an equitable interest in real property, such as the interest of an entryman

after having complied with all of the provisions of the law affecting his entry. (Eshleman and Trippet's brief, pp. 64 *et seq.*) We do not think, however, that these words are used in the statute in any restricted or technical sense, but rather in the ordinary sense, and with their usual signification.

In 4 Cyc. 6, is the following definition of assignment:

> "The term 'assignment' as ordinarily used, signifies the transfer, between living parties, of all kinds of property, real, personal, and mixed, whether in possession or action, and whether made by delivery, endorsement, transfer in writing, or by parol, and includes as well the instrument by which the transfer is made as the transfer itself."

And in the same volume, at page 14, it is said:

> "Any estate or interest in lands may be assigned; and this is so whether the estate be legal or equitable, vested or contingent."

And numerous cases are cited in the foot notes of the above volume supporting the text.

In 2 Am. and Eng. Ency. of Law (2d Ed.) p. 1009, assignment is defined as follows:

> "An assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. The deed or instrument by which the transfer is made is also called an assignment." (Citing numerous cases.)

Also at page 1044 of the same volume, it is said:

> "As a general rule, every estate and interest in lands and tenements may be assigned."

Anderson's Law Dictionary defines "assignee" as:

> "He to whom property is transferred."

And also defines "assigns" and "assignees" as:

> "Those to whom rights have been transmitted by particular title, as by sale, gift, legacy or other transfer or cessation. Technically, designated the grantees of real estate in fee simple; for convenience, came to embrace in its spirit all who succeeded to the title by any other means than by descent."

Another definition also given for the said words by the same author is as follows:

> "Comprehends all those who take, immediately or remotely, from or under an assignor, whether by conveyance, devise, descent, or act of the law."

In Andrews v. Bank, 7 Hun. (N. Y.) 20-22, it was held that "assignee" included a grantee under a deed.

In Brown v. Agricultural Asso., 34 Minn. 545 (26 N. W. 907) "assignment" was defined to mean, substantially:

> "The transferring or making over to another any property, real or personal, in possession or in action, or any estate or right therein."

To the same effect are:

Hendricks v. Daniel, 119 Ga. 358 (46 S. E. 438);

Griffey v. Ins. Co., 100 N. Y. 417 (3 N. E. 300).

THIRD POINT.

It is against the policy of the United States to permit assignment or transfer of an entry upon non-mineral lands before the entryman has earned the patent and thereby acquired the equitable title.

We have been unable to find a single case in which the courts have decided that inchoate rights of an entryman under any of the land laws of the United States relating to the disposal of the non-mineral public lands, are assignable before the vesting of the equitable title. It was contended in the court below by counsel for the government that the power to alienate any interest in or any right to public land exists in the entryman, unless restrained by act of congress, and that no express words allowing such right of alienation are necessary. It was therefore argued that as neither the Act of 1877 nor the Act of 1891 contained any express restrictions upon this inherent right of the entryman to alienate his desert land entry before relamation, it necessarily follows that he possessed such right.

We think there are two conclusive answers to this proposition, to wit:

First: That the provisions of the desert land laws requiring declaration under oath by the entryman that he intends to reclaim, and requiring him, personally, to reclaim, and to make due proof thereof, amount to an express prohibition in the law against such right of assignment prior to reclamation. The authorities and reasons set forth under the "First Point" in this brief, constitute our support for this answer.

Second. That it is against the policy of the United States, as expressed in the laws relating to the sale or disposal of public lands, and the decisions of the courts, to permit an entryman to sell or dispose of his interests acquired by the initial entry before he has done all that is required under the law to be done by him in order to earn the patent and thereby acquire the equitable title.

In discussing this second answer, we will first consider the cases relied on by counsel in support of their proposition above stated, not one of which cases, as we understand them, involved the transfer of the entryman's rights prior to the vesting of equitable title; but on the contrary, in every one of them, equitable title had vested, and it was in respect to the transfer of such equitable title that the court in each instance was speaking.

The case of Simms v. Guthrie *et al.*, 9 Cranch. 19 (3 Law Ed. 642) was an action wherein the defendants in error, who held certain lands under patent, prayed that the plaintiff in error, Simms, might be decreed to convey to them so much of the land as was included within a patent under which he, Simms, held. The patents under which the respective parties held were issued pursuant to an act of the assembly of Virginia of 1778, which contained the following provision:

> "That all of those who, before the first day of January, 1778, had marked out or chosen for themselves any waste or unappropriated lands, and built any house or hut, or made other improvements thereon, shall also be entitled, on like terms, to any quantity of land, to include such improvement, not exceeding 1000 acres, and to which no other person hath any legal right or claim."

The patent under which the defendants in error claimed was based upon entry of the land and improvements made thereon by one Ash who obtained due certificate therefor, and subsequently assigned that certificate to T. and H. who obtained the patent and thereafter assigned the patent to the defendants; and the question was as to the validity of the assignment from Ash to T. and H. before the issuance of patent; the court at page 24 said:

> "Terrill and Hawkins entered 1000 acres of land to include his, Ash's, improvement. It was then a warrant founded on an im-

> provement; and that improvement was made, not by them, but by a single person; of that single person Terrill and Hawkins were, of course, the assignees."

So it appears that under the act an entryman became entitled to patent for the land upon making certain improvements. Having made those improvements, his equitable title to the land thereby vested, and the facts recited in the case show that the assignment was not made until after the required improvements were made, and the equitable title thus acquired; and the assignment, therefore, was not simply of the right to enter, but of the equitable interest acquired by the entryman in the land by the making of the necessary improvements.

The case of Tredgill v. Pintard, 12 How. 34 (13 Law Ed. 877) does not support the proposition for which it is cited by counsel; the question in that case was not the assignability of the pre-emption rights. But the point there decided is that where one has entered into possession of valuable lands under an assignment and conveyance of the entryman's pre-emptive rights therein, and has obligated himself to pay the agreed consideration therefor, he can not repudiate such obligation and free himself from paying the same by pre-empting the land in his own name under a subsequent act of congress respecting the pre-emption of public lands; that the attempt to avoid

the payment of the consideration for the transfer of such rights by procuring the title in his own name, was fraudulent on the part of such assignee; that if he desired to repudiate the title of his assignor and to rescind the transaction, it was incumbent upon him to relinquish the possession of the land to his assignor.

French v. Spencer, 21 Howard, 226, (16 Law Ed. 97), arose under the Military Bounty Act of March 5, 1816 (St. L. 256). One Fosgit obtained a warrant for 320 acres as a Canadian volunteer in the War of 1812 with Great Britain. This warrant he located on the land in dispute January 3, 1816, and on the 28th of the same month conveyed the land to one Spencer, who shortly thereafter died in possession of the land. Patent to the land was issued to Fosgit in 1816 and he died in 1823. An heir of Fosgit thereafter commenced an action in ejectment against the heirs of Spencer, claiming that the deed from Fosgit to Spencer was void on its face, being in violation of the Acts of Congress touching the Military Bounty Act, and against the policy of the United States on that subject. The court, however, held the deed to be a valid conveyance. That decision was affirmed by the Supreme Court after a careful discussion of the Military Bounty Acts and the authorities relating thereto, and concluded as follows:

> "We are therefore of the opinion that Fosgit could sell and convey the land to Spencer after the entry was made."

It will be observed that the entry, or in other words, locating his warrant upon the particular piece of land, was all that the act required of a soldier holding such warrant in order to vest in him the equitable title to the land. He had already fulfilled the other requirements under the act which the government regarded as compensating it for the land, viz., the voluntary services he had rendered for the government in the Canadian War. Hence, at the time of the conveyance in question, he held the full equitable title to the property.

Maxwell v. Moore, 65 U. S. 185 (16 Law Ed. 251), involved the question whether the Act of 1826 (4 St. L. 190) permitting a soldier who had located his military warrant on worthless land to relinquish that land and relocate, carried with it the prohibition against alienation before patent, contained in the former Military Bounty Acts of 1812. The Supreme Court held that the two acts had no necessary connection, and that a contract or bond to convey a "float," that is, the land that might be entered under the soldier's certificate, was valid under the Act of 1826, and said:

> "We are of the opinion that the acts have no necessary connection. That there was no good reason why the soldier who removed to

> Arkansas and inspected his tract of land then patented and alienable, should not contract to convey the tract he might get in exchange."

So here it will also appear that nothing more remained to be done by the soldier in order to vest his equity in the land located. He had rendered the military services to the government for which the right to enter the land had been given him by a grateful country in compensation for those services. He had therefore acquired the equitable title, and the court said that having so acquired it, he was entitled to exchange that land with the government for another piece.

In Meyers v. Croft, 80 U. S. 291 (20 Law Ed. 562), the question involved was whether a pre-emptor under the Pre-emption Act of September 4, 1841, could alienate his entry after having earned the patent therefor, but before the issuance of patent. In view of the prohibition contained in that act to the effect that any grant or conveyance made by the entryman before patent was null and void, it was held that the words "before patent" referred to the time when the right to patent vested in the entryman, and not after, and the prohibition related to the time anterior to the vesting of the right to patent. The court, speaking by Mr. Justice Davis, said:

> "The object of congress was attained when the pre-emptor went with clean hands to the Land Office and proved up his right

> and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor; and could serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the general land office until several years after the certificate of entry is given, and equally well known that nearly all valuable lands in the new states admitted since 1841 have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for and the certificate of entry received. In view of these facts, we can not suppose, in the absence of express declaration to that effect, that congress intended to tie up these lands in the hands of the original owners until the government should choose to issue the patent."

Instead of being an authority in support of the proposition contended for by counsel for the government, we submit that this case is direct authority in support of our contention, to the effect that the rights acquired by an entryman prior to earning the equitable title, can not be disposed of by him. This finds support, not only in the language already quoted, but in the following from the same opinion:

> "It had been the well defined policy of congress in passing these laws not to allow their benefit to inure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase

> valuable lands on account of their withdrawal from sale, would procure middlemen to occupy them temporarily, with indifferent improvements, under an agreement to convey them so soon as they were entered by virtue of the pre-emption laws. When this was done and the speculation accomplished, the lands were abandoned."

In Hussey v. Smith, 9 Otto 20 (25 Law Ed. 315), the question was as to the validity of a sale under mortgage foreclosure of a lot in a town site located under the Townsite Act of March 2, 1867, Sec. 2387 R. S., and it was there held:

> "Until the mayor of Salt Lake City had made the entry at the proper land office, which he was authorized to make, the legal title was in the United States. By the entry it became vested in the mayor. He held the entire tract so entered 'in trust for the several use and benefit of the occupants thereof, according to their respective interests.'"

The word "entry" under this act, was held to mean "The filing of the application by the proper officer with a register of the land office, and proof of the performance of the condition in respect to the settlement and occupancy of the townsites." (Lockwitz v. Larson, 16 Utah, 75.) It would therefore appear in this case that when the mayor had made his entry and the necessary conditions in respect to the settlement and occupancy of the townsite had been performed, the equitable title vested in the mayor and the transfer referred to

in that case was a transfer of the equitable title and not of any inchoate right or interest arising from the initial proceedings of entry.

St. Louis Smelting etc. Co. v. Kemp, 104 U. S. 635 (26 Law Ed. 875), was an action at law for the possession of a parcel of land in Leadville, Colorado, located as a number of placer mining locations, and subsequently was acquired by purchase by one Thomas Starr, who applied for and procured a patent for the same as a mining claim. Starr subsequently conveyed the land so patented to him to the plaintiff. A question arose as to whether one person could purchase several mining locations containing in the aggregate more than twenty acres and patent all in one group under one patent; and Justice Field, in rendering the opinion, said:

> "Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim. Section 13 of the Act of 1870 declares, that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the Statute of Limitations of the state or territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Section 5 of the Act of 1872, rendering a mining claim subject to re-location where certain conditions of improvement or expenditure have not been

made, has a proviso that the original locators, 'their heirs, assigns or legal representatives have not resumed work upon the claim after such failure and before such location.' "

The great jurist was there discussing mining locations and the laws relating thereto. He had given a brief history of the development of the mining laws and the rules and regulations established by miners in the mining districts created by them, and had in mind the character of the claim or interest the miner acquired in his location, and he there carefully points out in the portion of the opinion above quoted that the mining laws of the United States expressly recognize the salable character of one's interest in a mining claim. The discovery of a mineral bearing lode upon a quartz location, or of the mineral contained in placer locations, itself calls for the expenditure of time, labor, and sometimes very large sums of money, and this discovery must precede location, and might very properly be considered, and doubtless is considered, as vesting in the locator who has made such expenditures of time and money, the equitable title to the property. But however that may be, the laws of the United States in respect to the disposal of its mineral lands, as shown by Mr. Justice Field in the above opinion, are very different from those in respect to the disposal of its agricultural lands. In the one, it has always recognized the right of

the locator to sell, while in the other, it has never recognized such right in advance of the acquisition of the equitable title, so far as our research has been able to discover.

The case of Telfener v. Russ, 145 U. S. 522 (36 Law Ed. 800) did not involve any law of the United States relating to the public lands. The lands there in question were public lands of the state of Texas, and under the laws of Texas were open for sale on the most liberal terms to any person, firm or corporation desiring to purchase the same. The action was for damages alleged to have been suffered by a breach of contract to purchase certain of said lands.

The case of Beley v. Naphtaly, 169 U. S. 353 (42 Law Ed. 775) involved the construction of the remedial Act of 1866 entitled "An Act to quiet land titles in California," 14 St. L. 218, permitting persons who in good faith and for value had purchased lands of Mexican grantees or assigns, whose grants had subsequently been rejected, to purchase the same lands from the United States at the minimum price established by law, upon complying with the provisions of said remedial act. And it was held that a person who was within that statute was not confined to the actual purchase from the government himself, but might assign or convey his right, and his grantee or assignee, immediate or remote, could exercise such right to purchase the land

from the government. It was to relieve from the inequities and hardships occasioned innocent purchasers by rejection of the grant that the act was passed. It was a special act for a particular purpose, and does not form any part of the general land laws of the government, and was construed liberally with a view of effectuating its remedial purpose. The Supreme Court recognized the equitable interest or title of such purchaser, and basing its ruling in respect to this point upon the fact of such interest having been acquired, at pages 358-9 said, by Mr. Justice Peckham who delivered the opinion of the court:

> "The hardship to be relieved from by these special acts and by the general Act of 1866 did not solely exist in the fact that there had been a formal grant from the Mexican authorities, which was in some manner defective, so that no valid claim or right could grow out of such grant, but it also existed when a claimant, in possession of land which he had *bona fide* and for a valuable consideration purchased of one who claimed his right or title from the Mexican or Spanish government by way of a grant therefrom, was nevertheless unable to prove such grant, and as a consequence could not prove any valid title or claim in himself. Whether such invalidity were on account of some defect in the proceeding which resulted in a defective grant, or whether it existed by reason of an inability to prove an actual grant, was not material, so long as the claim of title actually rested upon what was in good faith supposed to have been a valid claim under

> the government of Mexico, and so long as there was no valid adverse right or title other than that of the United States. Persons occupying lands which they possessed under such circumstances and by such a claim were entitled to considerate treatment from the government of the United States. They had in good faith paid a valuable consideration for the lands, of which they were in possession by virtue of such purchase, and they ought to have the first right to make good their title by purchase from the government at the lowest price named."

The case of St. Louis M. & M. Co. v. Montana M. Co., 171 U. S. 651 (43 Law Ed. 320), concerns the right of a mine locator to alienate his mining location, and the decision is in harmony with that in St. Louis S. & R. Co. v. Kemp *supra.*

In the cases of Webster v. Luther, 163 U. S. 331 (41 Law 179), Rose v. Nevada Wood & Lumber Co., 73 Cal. 385, Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, the equitable title had in fact vested before any attempt was made to assign. Those cases all arose under the provisions of the law extending to soldiers and sailors of the United States during the recent rebellion the right to enter upon and receive patents for a quantity of public lands, which, in addition to the land already acquired from the government, shall not exceed 160 acres, commonly known as the "Soldiers' Additional Home-

stead Law." Sections 2304 and 2306 R. S. The warrant which was issued to such soldiers and sailors as fell within the provisions of this law was personal property and entitled them to locate upon any of the public agricultural lands of the United States. By this law congress extended the bounty of the government to those soldiers and sailors as a recompense in a measure, at least, for the valuable services they had rendered in the protection of the government in time of war. It required nothing further from them. They had, in other words, already earned the patent to such lands by the services they had rendered. As said by Mr. Justice Brewer, sitting in the Circuit Court for the District of Colorado, in the case of Mullen v. Wine, 26 Fed. 206, a case similar to Webster v. Luther:

> "It must be borne in mind that this is not a case in which there is to be future consideration or future duty. It is personal, in that only that of a certain class can avail themselves of the gift. It is not personal in the sense that future services or future conditions are imposed. Services already rendered during the war are the consideration. The homestead duty of occupation or improvement has already been performed. It amounts simply to this: In view of what has been done, congress makes this gift. It places no restrictions on the donee, but leaves him to use the gift as he sees fit."

Also in Pourier v. Barnes, 57 Fed. 956, where the same question was involved as in Webster v. Luther, it was said by Nelson, Dist. J.:

> "April 4, 1872, an act was passed, the second section of which gave additional homesteads to soldiers, and as first enacted it seemed to indicate that the entry of the additional homestead must be made in accordance with the provisions of the Act of 1862, above referred to. This section was amended June 8, 1872, and subsequently March 3, 1873; and if we look at the history of this legislation, and examine the original act and amendments thereto, (contained in 17 Stat. 49, 333, 605) it seems clear that the right to enter additional land was given to the soldier as a gratuity."

It therefore appears that these cases do not support the proposition for which they are cited by counsel for the government, but that in each of them nothing more was required of the soldier or sailor to earn the patent. He had earned it by his services, and therefore stood in the same position as an ordinary entryman of public lands who had done all that was required under the law to be done by him to entitle him to patent but to whom patent had not yet issued.

In 32 Cyc. 866, speaking of bounty military warrants, issued to those who had rendered military services to the United States, it is said:

> "The holder of a land warrant, free from question, had, by statute, an absolute right to locate land under it, and to receive a pat-

> ent for such land, and a land warrant was not canceled, nor did the title thereto pass from the locator, until it was accepted in payment for land by the United States. One who entered land under a bounty land warrant became the equitable owner thereof, and the mere naked legal title remained in the United States until the issuance of the patent, and it has been held that a certificate of location of such a warrant was *prima facie* evidence of legal title in the holder of the certificate."

In U. S. v. Lair, 118 Fed. 98, it was held: (Syllabus.)

> "An application for the entry of a soldier's additional homestead under Revised Statutes Sec. 2306, is not made under the homestead laws, but such grant is in the nature of a bounty to the soldier."

In Barnes v. Poirier, 64 Fed. 14, the question was whether the right to land additional to a homestead granted by Sec. 2306 R. S. was assignable before entry of such additional land. Judge Sanborn, in delivering the opinion of the court, carefully reviewed the legislation on that subject and the conclusion reached by him was that such additional entry was not a homestead entry, but a mere gift or bounty by the country in compensation of services rendered.

The case of Phillips v. Carter, 135 Cal. 614, apparently is most confidently relied upon by counsel for the government in support of the assignability of desert land entries before reclama-

tion. But that case did not involve that question at all, and we do not think from a careful reading of the opinion that that question was in the mind of Mr. Justice Henshaw when he wrote the opinion. The facts recited by the learned justice show that during the lifetime of Foster, the entryman, the land had been irrigated and reclaimed as required by the desert land laws; that his entry, with many others in the same district, had been suspended by the general land office, and so remained until 1890, during which time it was impossible for Foster to make final proof and payment. Foster died in 1886, and his widow, to whom the land was distributed in probate, conveyed all of her rights therein to the plaintiff, in 1896, who immediately thereafter made final proof and payment, and received final certificate. And in the light of these facts the court said:

> "The right of alienation or assignment, therefore, in the absence of imposed restriction, vests in the entryman, and, as has been said, there is nothing in the law imposing such restriction, while, upon the other hand, equitable considerations impel strongly to the view that such rights should be assignable. The case at bar is illustrative of this. *Foster had filed his declaratory statement, paid twenty per cent of the purchase price, and reclaimed the land as required by law. He was not permitted to make his final payment and proof, because the right to do so had been per-emptorily suspended by order of the land department. Foster then, having done all that the law requires*, and being un-

> able to obtain his patent, dies. To hold that his right, perfected in so far as he could perfect it, was not alienable, and did not descend, would mean that the policy of the government was to deprive his heirs of the fruits of his labor and expenditures, and leave the land, with all its improvements, open to the first comer who might obtain possession of it." (Italics ours.)

So here the land had been reclaimed according to law, and all that was required to be done by Foster to entitle him to patent had been done, but he was not permitted by the arbitrary act of the land department to make final payment and proof, because of the withdrawal of said lands. He had earned the equitable title, and it was that title and interest and not the inchoate rights incident to entry and reclamation that the widow had assigned.

In the case of Adams v. Church, 193 U. S. 510, (48 Law Ed. 769) Adams and Church had been partners. At the time of the formation of the partnership Adams was the owner of a timber culture claim covering the land in controversy, but had not completed his entry so as to be entitled to the patent therefor, and it was agreed at the time of the formation of the partnership that such claim should be conveyed to and become a part of the assets of the firm as soon as Adams should acquire title from the government. It was contended that such an agreement was vio-

lative of the act and contrary to public policy. This court, by Mr. Justice Day, said:

> "We perceive no reason why such contract as was found to exist by the Supreme Court of Oregon would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest, to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law. (Myers v. Craft, 13 Wall. 291, 20 L. Ed. 562.)"

It therefore clearly appears that there was not a present executed transfer or assignment by Adams to Church of all the former's right, title and interest in the entry, but only an executory agreement to convey after he had acquired the title. It certainly can not be said that this decision is authority for the proposition that an entryman may assign and transfer his entry before having earned title, and thereupon drop out of the proceedings altogether, and that his assignee may then take up the proceedings requisite for patent and complete the same in his own name, and

thereupon be entitled to patent. The language of Mr. Justice Day simply emphasizes our contention throughout this case that the things to be done in order to earn patent must be done by the entryman himself. He may agree, pending his occupancy, that when title has been acquired by him he will transfer and convey the property, but notwithstanding such agreement, he must complete the things requisite to title himself and in his own name.

In U. S. v. Biggs, 211 U. S. 507 (53 Law Ed. 305) the defendants were indicted for conspiring to defraud the United States by procuring persons to make entry of public lands under the Timber and Stone Act, and to convey said lands to a certain corporation when title therefor was obtained by the entrymen; thus enabling said corporation to obtain a large quantity of public land in excess of the quantity of public land it could lawfully obtain directly from the United States. The indictment did not charge that the several entrymen were disqualified as such, nor that when they made application they had outstanding contracts to sell, or were then acting under agreements or hire for the defendants or the said corporation. But so far as appeared upon the face of the indictments their respective entries were made before any agreement to convey was entered into. Demurrer to the indictments on the ground that they stated no offense against the

United States was sustained by the lower court, and this court in affirming that ruling, held: (Syllabus.)

> "An entryman who has made an application under the Timber and Stone Act of June 3, 1878 (20 Stat. at L. 89) chap. 151, U. S. Comp. Stat. 1901, p. 1545), as amended by the Act of Aug. 4, 1892 (27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1545), in good faith, and for his exclusive use and benefit, *is not prohibited from subsequently agreeing to convey the land covered by his application to another, and to perfect his entry for the purpose, after patent,* of fulfilling his contract, by the provision of the statute forbidding an entryman or applicant from making an application ostensibly in his own name, but in reality for, and on behalf of, another."

This case is on all fours with Adams v. Church, and simply goes to the extent of holding that an entryman under the Timber and Stone Act may, after having made the entry in good faith, and when he shall have acquired title, convey to another. Here, as in Adams v. Church, the entryman himself is required to complete his title before he actually assigns or conveys.

The case of Williamson v. U. S., 207 U. S. 425 (52 Law Ed. 278), was upon an indictment to suborn perjury in proceedings to purchase public land under the Timber and Stone Act. One of the main questions there involved concerned the nature of the final proof that is required under

the Timber and Stone Act. The facts of the case lead to consideration of the same proposition as that involved in U. S. v. Biggs and Adams v. Church, to wit: Whether an applicant under the Timber and Stone Act who has in good faith complied with the requirements of the act concerning his initial entry may contract, pending acquisition of title, to convey his rights in the land after patent. Upon this point Mr. Chief Justice White, speaking for the court, said:

> "Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the 2d section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right. These conclusions are directly sustained by a recent ruling in Adams v. Church, 193 U. S. 510, 48 L. Ed. 769, 24 Sup. Ct. Rep. 512, construing the timber culture act."

The foregoing cases which we have reviewed are the only ones, so far as we know, upon which counsel rely in support of their proposition that the right to alienate or assign his entry before reclamation, exists in the entryman of desert lands, unless such right is expressly restricted by the statute. As before said, we do not think a single one of the cases supports that proposition, but that in each of them the transfer referred to was of the rights acquired by completed entry, that is, after having done all of the acts required to be

done in order to earn the patent. But whatever construction may be placed upon these decisions it certainly cannot be asserted that any of them go to the extent of authorizing or holding that by virtue of assignment before equitable title has vested, the entryman is relieved of all further responsibility in respect to his entry; that he simply steps aside, and that the assignee takes his place, and is entitled to complete the entry in his own name. On the contrary, it is carefully pointed out that the entryman himself must fulfill the requirements of the statute in respect to earning the patent, even in cases where he has agreed to assign.

We think it is against the clearly expressed policy of the United States to permit assignment or transfer of a non-mineral entry upon any of the public lands of the government before the entryman has done all of the things required under the law to be done in order to entitle him to patent.

Under the laws regulating the disposition of public lands any portion thereof entered upon by one entitled to make such entry, remains a part of the public domain until the entryman has complied with all of the requirements and conditions of the law requisite to patent. Until then the legal and equitable title is in the government and the entryman is admitted to the use and possession of the land only as a privilege to enable him to comply with the conditions of the law respect-

ing reclamation, occupancy, improvement, or whatever is essential in order to earn the title. Until he has fully performed these conditions, he acquires and has no proprietary rights in the land which the government is bound to recognize. His initial proceedings of entry only segregates the land from the public domain, so that no rival claimant could successfully initiate any right to it until his entry was cancelled. But it gives to him only the right of present and exclusive possession for the purposes above stated.

In Shiver v. U. S. 159 U. S. 491 (40 Law Ed. 231) this court said:

> "The right which is given to a person or corporation, by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But, as to the government, his right is only conditional and inchoate. * * * The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings and fences, and to clear the land for cultivation, and to that extent the act limits and modifies the Act of 1831, now embraced in Revised Statutes, Sec. 2461. It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility

of his abandoning it, but he may not, in the meantime, ruin its value to others, who may wish to purchase or enter it."

Frisbie v. Whitney, 9 Wall. 187 (19 Law Ed. 668);

Campbell v. Wade, 132 U. S. 34 (33 Law Ed. 240);

Hutchings v. Lowe (Yosemite Valley case), 82 U. S. 77 (21 Law Ed. 82);

U. S. v. Waddell, 112 U. S. 76 (28 Law Ed. 673).

In Braun v. Mathieson, 116 N. W. 789, it was held:

"Under Timber Culture Act of June 14th, 1878 (20 St. L. 113), granting the right to enter public lands, and providing that after the performance of specified conditions the entryman would be entitled to a patent, the grant was not in presenti, but the entryman acquired, as against the United States, only the right to occupy the land entered and perform the conditions which would enable him to acquire the title, and he had no vested right until the conditions were fully complied with."

In Walker v. Ehresman, 113 N. W. 281, it was held:

"Under Timber Culture Act, legal title is in the government until patent, so that the entryman has no devisable interest therein and devisees acquired no title."

In Pacific Live Stock Co. v. Gentry, 38 Or. 375 (61 Pac. 422) it is said:

"The usual policy of the general government for many years, except in cases of extensive grants to aid corporations in developing the country, has been to reserve the public domain for its citizens, who have been permitted to secure title to tracts of certain area upon condition of *bona fide* settlement and cultivation. They have been permitted, by a tacit license of the United States, to settle upon and cultivate the public land prior to its survey; and such settlement has been recognized by the officers of the interior department of the government, as conferring upon the settler a prior right to file upon the same in the local land office, when surveyed. Courts of equity, acting upon the recognition of such settlement as conferring an inchoate right to the land, and invoking the maxim that equity will not suffer a wrong without a remedy, have enjoined the disturbance of such right by parties who would trespass upon the land so settled upon. Kitcherside v. Myers, 10 Or. 21; Jackson v. Jackson, 17 Or. 110, 19 Pac. 847. 'The right of such a settler being property,' said Mr. Justice Bean in Hindman v. Rizor, 21 Or. 112, 27 Pac. 13, 'he may sell and transfer it so as to pass his right thereto, and, except as against the government, vest the rightful possession in the purchaser.' The legal principle thus announced will, of course, be understood to relate to the transfer of such *possessory right* to one who is or may, under the provisions of law, become entitled to secure directly from the government a legal title to the land so claimed. *The purchaser not being able to tack his set-*

> *tlement to that of his predecessor,* the effect of the transfer is the initiation of a new right by which the prior settler surrenders his interest in the premises to the United States, which tacitly licenses the purchaser to take and hold the possession with the intention of securing the title. To become such licensee, the purchaser must be a qualified settler; that is, he must be a citizen of the United States, or capable of becoming such in the manner prescribed by the acts of congress, and must make a *bona fide* settlement upon the land in person, with intent to obtain the title to the same by complying with the provisions of the land laws of the United States. Peterson v. Railroad Co., 27 Minn. 218, 6 N. W. 615."

The legal and equitable title being in the government until the entryman has earned the patent, pursuant to the requirements of the patent law under which he made his entry, he has no vested right or interest in the land to sell. To permit him to assign or transfer the inchoate rights initiated by his preliminary entry proceedings, not only opens wide the door for speculation, but offers an inducement for fraud or attempted fraud upon the government, which we believe congress never contemplated. There being no provision in the desert land laws prior to the Act of 1908, requiring an assignee (if the law contemplated assignments before reclamation) to possess the same qualifications as required of an entryman, and no oath or declara-

tion being required of such assignee of his intention to reclaim, and there being no limit, pending reclamation, to the number of assignments that might be taken and held by one person, it is easy to imagine the extent of reckless speculation that might be indulged and impositions that might be practiced upon the government, if this interpretation of the law is permitted to stand. One needs not the aid of fancy to picture the wholesale speculation and frauds practiced or attempted to be practiced upon the government in respect to desert land entries and assignments as a result of such interpretation; for it is a matter of common knowledge that after the opening of the great system of irrigation in the Imperial Valley, land values there advanced with astonishing rapidity. Nearly the entire valley was taken up under desert land entries; assignments and reassignments almost without number were made of single entries, without the actual expenditure of a dollar by the entrymen or their assignees for reclamation or cultivation. The only expenditure that was made in connection with the entry was for the purchase of stock of the company organized for the purpose of furnishing water for irrigation of said lands pursuant to a ruling of the Land Department that such purchase would constitute the basis of proof of annual expenditure, and this stock being assignable in like manner as the practice of assigning

the entries, made the process of assignment of desert land entries simple and easy. It was developed in the trial of the recent case of U. S. v. Chaplin *et al.*, in the District Court of the United States for the Southern District of California, that many desert land entries in Imperial Valley were made by applicants who took the necessary oath that they intended to reclaim, when at the time of taking the oath they had no intention or thought of reclaiming, but were simply taking advantage of the opportunity afforded by the ruling of the Land Department to deceive and defraud the government by such false declarations, out of the use and possession of its lands for speculative purposes. It was a common thing for a man to engage in the business of buying and selling desert land entries, the assignment, as above stated, being executed by the original entryman in blank as to the assignee, and in that form passing from one assignee to another. As might be expected, this unrestrained speculation led to a multitude of contests, as appears by the records of the local land office at Los Angeles, California, until the condition of desert land titles in Imperial Valley became so chaotic that relief was sought and in a measure obtained under an act entitled "An act for the relief of assignees in good faith of entries of desert land in Imperial county."

We do not think it was the intent of congress to enact a law that would make possible such a condition, or that it is the policy of the government to permit it. In the case of Salina Stock Co. v. U. S. 85 Fed. 339, suit was brought to vacate two patents to desert lands granted to the defendants Edward A. Franks and Nellie Franks. It was substantially alleged and proven that the Franks and the Salina Stock Company conspired together to defraud the United States of certain of its desert lands by making entry thereof in the names of the Franks, but really for the use and benefit of said company. The Franks never went upon the land before or pending its reclamation until about the time for making the final proof, and then only for one day, and never paid any of the money required of the entryman of the land. Immediately after making their final proofs, they made to the company quit-claim deeds of the land, with a nominal consideration expressed therein, and received the sum of $215 which covered their expenses, and which, as said by the court, "was presumably to compensate them for the use of their names." The trial court rendered a decision as prayed for in the bill, cancelling the patents because of said frauds alleged and proven, and the Circuit Court of Appeals for the Eighth Circuit, by Phillips, district judge, in affirming the decision of the lower court, said:

> "In the language of Judge Story (Fed. Cas. Number 6376), 'One cannot wink so hard as not to see.' Blind and deaf, indeed, would be the chancellor who was not led to the door of truth by such palpable facts and persuasive circumstances."

In U. S. v. McIntosh, 85 Fed. 333, the same district judge, in construing the desert land laws, said:

> "There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected, for the benefit of even a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation. In such case, if the patent be issued to her, she could transfer to whom she pleased."

And quoted the following from Mr. Justice Brewer's opinion in U. S. v. Budd, 144 U. S. 163 (36 Law Ed. 384):

> "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. * * * If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied."

In Myers v. Croft, *supra,* Mr. Justice Davis, speaking of the policy of the government against permitting speculation in the inceptive rights acquired by entries under the pre-emption laws, said:

"It has been the well defined policy of congress, in passing these laws, not to allow their benefit to inure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands, on account of their withdrawal from sale, would procure middle men to occupy them temporarily, with indifferent improvements, under an agreement to convey them so soon as they were entered by virtue of their pre-emption rights. When this was done and the speculation accomplished, the lands were abandoned."

"This was felt to be a serious evil, and congress, in the law under consideration, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation, but, in good faith, to appropriate it to his own use."

In U. S. v. Brace, 149 Fed. 869, District Judge DeHaven, speaking of the Timber and Stone Act, said:

"The obvious intention of the statute is to restrict the right to purchase the lands to which it refers to persons who in good faith enter the same for their own use and benefit. The applicant must not be a 'dummy' or a mere nominal purchaser, who in making application to purchase simply allows his name to be used for the purpose of acquiring from the government the legal title to the land applied for, with the intention of immediately transferring such title to some other person under a direct or indirect agreement or

> understanding that such is the purpose for which the entry is made; nor must he apply 'to purchase the same on speculation.' Olson v. United States, 133 Fed. 849, 67 C. C. A. 21."

In Morehouse v. Phelps, 62 U. S. 294 (16 Law Ed. 140), congress had passed an act providing for the laying out of a town at and including Galena, Illinois. The act, among other things, provided:

> "Each and every person, or his, her or their legal representative or representatives, who shall heretofore have obtained from the agent of the United States a permit to occupy any lot or lots in the said town of Galena, who shall have actually occupied and improved any lot or lots in said town, or within the tract of land hereby authorized to be laid off into lots, shall be permitted to purchase said lot or lots by paying therefor in cash," etc.

And by an amendatory act it was provided that the commissioner appointed should have power to hear evidence and determine all claims arising under that act and the amendment, and to determine in favor of the person having the right of pre-emption under the act; and upon making payment to the receiver at Galena for the lot, the person entitled thereto should receive a receipt from the receiver of the local land office for said final payment, the same to be transmitted to the general land office as in other cases of sale of public land. Phelps claimed that he was entitled

to the lot as the legal representative of one Guyard who made the original entry thereon by virtue of a conveyance to him by the said Guyard, and that he was entitled to have the certificate of purchase issued to him; while Morehouse claimed that he was the legal representative of Guyard by virtue of having made claim to the lots before the board of commissioners, which claim was allowed and the lots entered at the land office. The case first arose in the Supreme Court of Illinois, which held that under the act of congress in question Phelps was the legal representative of Guyard and entitled to the land. The construction of said statute being called in question, appeal was taken to the United States Supreme Court, which reversed the judgment of the Illionis Supreme Court, and among other things, said:

> "Up to the date of the entry and purchase, the title was in the United States; behind which date the courts of justice can uphold no deed of conveyance of the public lands, unless congress has authorized assignments of occupant claims to be made; and as congress has authorized assignments of occupant claims to be made; and as the Acts of 1829 and 1836 awarded the preference of entry to the claimant who applied, and obtained, the favorable decision of the board of commissioners, no inquiry can be made into the dealings between Phelps and Guyard."

In Hall v. Russell, 101 U. S. 503, (25 Law Ed. 829), action arose under the Oregon Donation Act, as to the right of a settler under that act to

devise the estate acquired by him in the lands entered upon, and whether or not the interest of the entryman passed by such devise prior to his completing the settlement and acquiring the equitable title, and the court said:

> "As there could be no grant until there was some person entitled to receive it, the conclusion would seem to be irresistible that, under this provision, married settlers had no estate in the land which they could devise by will, until from being qualified settlers only they had become qualified grantees. Having completed their settlement, and nothing remaining to be done but to get their patent, their estate in the land was one they could devise by will, or which would go to the surviving husband or wife and children or heirs of a deceased married person. Not so, however, with the mere possessory rights which preceded a compliance with the provisions of the act so as to entitle the settlers to their grant of the land. * * * We conclude, therefore, that under section 4 there was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation, and performing such other acts in the meantime as the statute required in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public lands, but not a grantee. His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language congress has used to make known its will."

The policy of the government against entries for purposes of speculation is definitely expressed

in the circular issued February 26, 1907, by the Department of the Interior entitled "Rules and Regulations governing the Department of the Interior in its various branches furnished in response to a resolution adopted by the senate of the United States February 1, 1907," at page 536, part 3, under the heading "Relinquishments" in the following language:

> "Entries and filings made for the purpose of holding the land for speculation and the sale of relinquishments are illegal and fraudulent, and every effort in the power of the government will be exerted to prevent such frauds and to detect and punish the perpetrators."

FOURTH POINT.

The construction put upon the desert land laws by the Department of the Interior can not prevail against the clearly correct legal interpretation of those laws.

We think we have demonstrated by the foregoing argument that the desert land laws are not ambiguous or uncertain in respect to the non-assignability of the rights of the entryman prior to reclamation. It is only where the act or statute in question is of doubtful meaning or ambiguous in its terms that the courts will follow the construction placed upon such act or statute by one of the executive departments of the government. As said in Webster v. Luther, 163 U. S. at page 342 (41 Law Ed. 182):

> "The practical construction given to an act of congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. Bates Refrigerating Co. v. Sulzberger, 157 U. S. 1, 34 (39: 601, 610); United States v. Healey, 160 U. S. 136, 141 (40: 369, 371). But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."

In U. S. v. Grand Rapids & I. R. Co., 154 Fed. at page 136, it was said:

> "The construction put upon the grant by the Land Department, as not excepting lands reserved for Indian purposes, cannot legally prevail against a clearly correct legal interpretation. Wilcox v. McConnell, 13 Pet. 511, 10 L. Ed. 264; Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. Ed. 71, and cases there cited. If the views above expressed are correct, it results that the lands in question were in contemplation of law reserved from the grant of June 3, 1856, and did not legally pass thereunder."

In U. S. v. Tanner, 147 U. S. 661 (37 Law Ed. 322) it is said:

> "If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but as it is clear to us that this construction was erroneous,

we think it is not too late to overrule. United States v. Graham, 110 U. S. 219 (28: 126); Swift & C. & Breecher Co. v. United States, 105 U. S. 691 (26: 1108). It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material."

In Houghton v. Payne, 194 U. S. 88 (48 Law Ed. 888) it was said:

"But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. United States v. Graham, 110 U. S. 219, 28 L. Ed. 126, 3 Sup. Ct. Rep. 582; United States v. Finnell, 185 U. S. 236, 46 L. Ed. 890, 22 Sup. Ct. Rep. 633. Contemporaneous construction is a rule of interpretation, but is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the Department, however, long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221, L. Ed. p. 127, Sup. Ct. Rep. p. 583), 'if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect.' But with the language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid."

FIFTH POINT.

Unless the right of the entryman to assign before reclamation and of the assignee to reclaim and make necessary proof thereof, come within the plain meaning of the words of the statute, as well as within the spirit of the statute, perjury can not be predicated upon such proof made by the assignee.

In U. S. v. Biggs, 157 Fed. 271, it was said:

> "From these authorities I understand the settled rule to be that, when it is sought to charge that designated acts constitute a crime under a statute, it is not sufficient that such acts be violative of the spirit and policy of the statute or of the words of the statute, but that they must be violative both of the words and of the spirit and policy of the statute; that, the acts must fall both within a reasonable meaning of its terms and also within the spirit and scope of the enactment, or, otherwise stated, the acts charged must come not only within the mischief, but fairly within the words. In the light of this time-honored, unbroken, and invariable rule, sustained constantly by all authorities, both ancient and modern, it seems idle to talk about following here the construction placed on the Timber and Stone Act in civil proceedings before the department, as shown in the Land Office decisions. We all agree that in the determination of civil rights, with which the department only can deal, its construction would be most helpful and valuable to the courts, and the instance would be rare, indeed, in which the courts would find it necessary to depart from the construction there

made. As evidence of this it is only necessary to cite Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157. In the determination of civil rights the words of a statute may be only a dry, lifeless form, to be disregarded if its purpose, scope, and policy, clearly ascertained within its four corners, convince to the contrary; but here, as above shown, we must keep within both the words and scope and policy of the statute."

In United States v. Clayton, 2 Dill. 219, Fed. Cas. No. 14,814, Judge Dillon said:

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses; but, if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism. Nevertheless the doctrine is fundamental in English and American law that there can be no constructive offenses, that before a man can be punished his case must be plainly within the statute, and, if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the

Supreme Court of the United States. U. S. v. Morris, 14 Pet. (39 U. S.) 464, 10 L. Ed. 543; U. S. v. Wiltberger, 5 Wheat. (18 U. S.) 76, 5 L. Ed. 37; U. S. v. Sheldon, 2 Wheat. (15 U. S.) 119, 4 L. Ed. 199. And see also Ferret v. Atwill, Fed. Cas. No. 4,747; Sedg. St. & Const. Law, 324, 326, 334; 1 Bish. Cr. Law, 134, 145."

In Smith v. Townsend, 148 U. S. 490, 497, 13 Sup. Ct. 634, 636, 37 L. Ed. 533, Mr. Justice Brewer, speaking for the court, said:

"Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken; where the statute acts upon the offender, and inflicts a penalty, as the pillory, or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally." 1 Bl. Com. 88.

In France v. United States, 164 U. S. 676, 17 Sup. Ct. 219, 41 L. Ed. 595, it is said:

"The statute does not cover the transaction, and, however, reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet, the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. * * * If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is

> so far outside of its language that to include it within the statute would be to legislate, and not to construe legislation."

We think the case at bar falls clearly with the principle enunciated in the foregoing opinions. The Act of 1891 plainly and unequivocally declares that the proof of annual expenditure must be made "by the party so entering," and the spirit of the act, as we have shown, accords with the plain, literal meaning of those words. Hence, however reprehensible may be the act of the defendant (and the charge must be taken as true for purpose of this demurrer) yet that act is so far outside the language of the law that "to include it within the statute would be to legislate and not to construe legislation."

Messrs. John M. Eshleman and Oscar A. Trippet prepared a brief as *amici curiae*, and stipulation was signed some time ago by Mr. L. H. Valentine as one of the attorneys for the defendant in error in this case for the filing of said brief. Believing that said brief had been filed, we have herein made frequent reference thereto, but since this brief was placed in the hands of the printer, we have been informed that the brief of Messrs. Eshleman and Trippet was not filed. We believe, however, that our references to said brief will not cause any confusion or uncertainty, as we think in each instance sufficient of the point in

said brief to which our reference was made is herein stated, so as to make our brief clear in those particulars.

For the reasons and upon the authorities hereinbefore given, we respectfully submit that the ruling of the lower court sustaining defendant's demurrer to the indictment should be affirmed.

VALENTINE & NEWBY,
Attorneys for Defendant in Error.

L. N. Valentine

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 314.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM B. HAMMERS.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

L. H. VALENTINE,
NATHAN NEWBY,
Counsel for Defendant in Error.

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THE UNITED STATES, PLAINTIFF IN ERROR,

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SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

IF ASSIGNMENT OF DESERT-LAND ENTRIES BEFORE RECLAMATION IS INVALID, THEN THE AFFIDAVITS IN PROOF OF ANNUAL EXPENDITURE BY SUCH ASSIGNEE ARE NOT AUTHORIZED OR REQUIRED BY THE LAW AND ARE WHOLLY IMMATERIAL, AND PERJURY CANNOT BE PREDICATED THEREON.

Since the preparation of defendant's brief we have been presented with copy of the Government's brief herein. Until then we had assumed that it would be conceded in the argument before

this court, as it was conceded by counsel for the Government in the court below, that if desert-land entries are not assignable before reclamation, then such assignee is not entitled to complete the reclamation of the assigned entry or to make the necessary proofs of annual expenditure; that such proof by assignee would be absolutely voluntary, not authorized or required by the statute and therefore wholly immaterial, and would not constitute perjury if false. The Government, however, in its brief filed in this court now insists that the affidavits constituting such proof of annual expenditure by the assignee are material regardless of whether assignment was valid or invalid, and argue that as the matter concerning which the said affidavits are made and filed is one within the jurisdiction of the Land Department to hear and determine, therefore, the testimony presented by means of such affidavits is none the less material even though the allowance thereof is error. After quoting from a number of cases for support of the proposition that the Land Office has jurisdiction over such matters, reliance for the materiality of such affidavits is placed upon a class of cases holding, in effect, that if false testimony is given in a case where the complaint or indictment is so fatally defective as not to state a cause of action or an offense, or where the evidence is wholly incompetent so as to cause a mistrial by reason of its admission, it will nevertheless constitute perjury because the court or tribunal had jurisdiction in the case.

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We submit, however, that this principle enunciated in the cases relied upon by the Government does not apply where the statute itself has prescribed what the proof shall be and who shall make it. The statute itself, in such event, becomes the test of the materiality. If the affidavit or testimony offered is such as is authorized or required by the statute it is material; if it is not such as the statute authorizes or requires, then it must be regarded as no proof whatever and consequently immaterial. If our contention is correct that desert-land entries are not assignable prior to reclamation, and that the law requires the entryman himself to reclaim and to make proof "by the affidavits of two or more witnesses" of his annual expenditures, then proof made by another person than the entryman that such other person has made annual expenditures to the extent required by law toward the reclamation of said land, does not meet the requirements of the statute and is immaterial.

The distinction between the case at bar and the class of cases relied upon by the Government in support of the proposition that the affidavit made by the defendant, Hammers, is material whether the assignment of this entry was valid or not, is clearly defined by District Judge Dyer in United States *vs.* Grottkau, 30 Fed., 672. In that case the defendant was indicted for perjury under section 5395, Revised Statutes of the United States, relating to perjury under the naturalization laws. It

was charged that at the time of defendant's application to become a citizen of the United States he made oath that he had resided in the State of Wisconsin for one year next preceding his application. The statute of the United States relating to the subject of naturalization, section 2165, Revised Statutes, provides, among other things, that "It shall be made to appear to the satisfaction of the court admitting such alien that he has resided in the United States five years at least, and within the State or Territory where such court is at the time held, one year at least; * * * but the oath of the applicant shall be in no case allowed to prove his residence."

The indictment was demurred to and the court in sustaining the demurrer said:

> "This being the statutory provision as enacted by Congress, we have to apply to the case, in the interpretation of the statute, the familiar and elementary principle that, to constitute perjury the oath or affirmation must be material, or, as it is stated in the opinion of the court in the case of Silver *vs.* State, 17 Ohio, 368, it must be required by or have some effect in law; furthermore, it is elementary that perjury cannot be assigned of an oath which is extrajudicial. Now, applying this rule of law, in connection with the statutory provisions cited, to this indictment, how stands the case? As we have seen, the oath which the defendant is alleged to have taken, and which is set out in the indictment, and therein alleged to have constituted the perjury complained

> of, is an oath that he had resided within the State of Wisconsin one year prior to the making of the application for naturalization. And we find that this was an oath which the statute expressly declared the court should not receive—for that is its effect—as proof of residence. This statutory declaration, that the oath of the applicant shall in no case be allowed to prove his residence is not equivalent to a statement that the oath shall not be a sufficient proof of residence. It is, as I interpret it, absolutely prohibitory, and makes such an oath, when taken by the applicant, of no weight in law as proof of residence."

The court then proceeds to distinguish that case from the class of cases relied upon by the Government, holding in effect that where a court or tribunal having jurisdiction of a matter commits some mistake or error in judgment in regard to the law, as, for example, in the admission of incompetent evidence, such error or mistake does not render the incompetent evidence admitted by reason thereof any the less perjury if false, and in defining such distinction Judge Dyer says:

> "Here, as we see (referring to the class of cases above mentioned), the court puts stress upon the point that the question, what was satisfactory proof, was one upon which it was the right and duty of the court to pass, because the statute had not defined what should be satisfactory proof. But in the case at bar we find that the statute on the subject of naturalization has in effect declared what shall be, or rather what shall not

be, the requisite and legal evidence of residence, since it prohibits the admission or allowance of the oath of the applicant to prove residence. So the distinction between the case (of the class referred to) and the case at bar is quite apparent, and the remark applicable to the case cited is applicable to all the cases of the class to which it belongs, namely, that they were cases in which it was in the power and authority of the court, and, indeed, its duty, to determine whether the testimony offered was competent and admissible. To none of them, so far as I have been able to ascertain, was there applicable, as here, a statutory provision which precluded the court from allowing the testimony offered; and it remained as a mere matter of judgment on the part of the court, in performing its duty on the trial, whether the evidence should be admitted or not."

Judge Dyer then concludes his opinion with the statement that the oath of the applicant was extrajudicial, "one which was not required or authorized by the law relating to the naturalization of aliens," and for that reason sustained the demurrer.

So far as we have had time to investigate, the cases appear uniformly to coincide with the opinion of Judge Dyer in the Grottkau case.

In United States *vs.* Bedgood, 49 Fed., 54, defendant was indicted in the Southern District of Alabama for false swearing in making final proof of her pre-emption entry. The indictment was demurred to on the ground that it did not state facts

sufficient to constitute an offense. District Judge Toulmin, in sustaining the demurrer, said:

> "There is no such thing as final proof required by the statute in pre-emption entries. The proof is primary or original, and the proof required and therefore material, is as to settlement and improvement. Sections 2259-2263, Revised Statutes. This is to be made agreeable to rules prescribed by the Secretary of the Interior. Section 2262 prescribes the oath to be taken by the pre-emptionist as a prerequisite to entitle him to the benefit of the law in such cases. The defendant was the pre-emptionist, if the procedure was that of a pre-emption entry. The false affidavit and oath alleged in the indictment to have been made by him in no respect conformed to the statute. Section 2262. It does not contain what is required by that statute to be sworn to, but contains statements of fact that, so far as it provides, are wholly immaterial. The statute makes the existence of certain facts, and requires certain declarations to be made, and oath thereof by the applicant or claimant, prerequisites to securing the rights of a pre-emptionist; an oath of other facts made by him in connection therewith, not required by law, however false, is not perjury. It must be authorized by law. The false testimony must be material, and the oath must be administered by one having legal authority to administer it. (Citing numerous cases.) State *vs.* Lloyd, 46 N. W., 898, where the Supreme Court of Wisconsin say 'that the principle is elementary that the statute must be strictly pursued, or the affidavit is unknown to the law. What he, the defendant,

> has stated in the affidavit in place of what was required to be stated by the statute is as material as if he had stated nothing. The perjury being assigned on what the statute does not require to be stated in the affidavit, the indictment states no crime.' * * * The false statements alleged to have been made must have been made in a proceeding valid and regular; that is in a proceeding or procedure authorized by law."

In United States *vs.* Nickerson and United States *vs.* Taylor, 27 Fed., case No. 15878, the two cases arose out of the same facts and were considered together. Separate indictments were returned against the defendants charging each of them with perjury in having sworn falsely in matters required by a Federal statute granting a bounty for the fishing season of 1853, in order to obtain such bounty. The indictment charged the defendant with swearing falsely in two particulars; first, as to the national character of the fishermen on board his boat—that is, that three-fourths of the crew were citizens of the United States, when in truth they were subjects of Great Britain; second, that the paper produced to the collector at the custom house when the defendant claimed the bounty was the original agreement between the owners, masters and men on board the said schooner during the season of 1853, when in truth and in fact it was not. It is said in the decision of the case:

> "District Judge Sprague on reading the indictment expressed the opinion that the

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> first charge, if sustained, could not authorize a conviction for perjury under the statute because that statute contained no requirement that three-fourths of the crew should be citizens of the United States."

And Judge Sprague held, as to the second charge, that the statute in question did not require the defendant to make oath as to the agreement, and said:

> "and as the production of the agreement is one of the requirements of the statute of July 29, 1813 (the statute involved in that case), while no oath regarding it is required by that act, the oath alleged to have been taken could not have been a legal one, and could not therefore be the ground of an indictment for perjury."

In State *vs.* Lloyd, 46 N. W., 898, defendant was charged with the crime of perjury in making a false affidavit in respect to his qualifications as an elector. The Supreme Court of Wisconsin said:

> "The material defect of this affidavit is apparent. It is not such an affidavit as the statute requires. It states the material conclusions that he was not then a qualified elector, but that he has since become a qualified elector by reason of being a qualified voter. The statute requires that '*he shall state the facts showing*' both such qualification and disqualification. No such facts are stated in the affidavit. What he has stated in place of such facts is as immaterial as if he had stated nothing. Plath *vs.* Braum-

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> dorff, 40 Wis., 107; Lathrop *vs.* Snyder, 16 Wis., 293; Miller *vs.* Munson, 34 Wis., 579; Rubber Co. *vs.* Knapp, 61 Wis., 103. * * * The principle is elementary that in such a case the statute must be strictly pursued, or the affidavit is unknown to the law. It was on these absent facts that the perjury, if any, should have been assigned. The statute does not require it to be stated that he was not then but has since become a qualified elector, but the facts showing it. The perjury is assigned on what the statute does not require to be stated in the affidavit. The information therefore states no crime."

In State *vs.* Helle, 2 Hill (S. C.), 290, it was held that perjury can not be predicated upon the affidavit of an applicant for naturalization as to his residence in the State previous to his application, because as to such matter no oath is required from the applicant by the statute. This case is on all fours with the Nickerson case and arose under the same Federal statute.

The United States *vs.* Maid, 116 Fed., 650, the defendant was indicted for perjury under section 5392, Revised Statutes of the U. S., for having made a false affidavit as to the non-mineral character of the land in a homestead entry. The indictment was demurred to, and among other objections is was urged that said affidavit was unauthorized by any law of the United States and was therefore immaterial. It was held by Judge Wellborn in sustaining the demurrer upon this point (Syllabus) "to constitute the crime of perjury under Re-

vised Statutes, sec. 5392, by the making of a false affidavit in relation to an entry of public lands, it is essential that such affidavit should be material, and that it should be authorized by a law of the United States. Such a charge can not be based upon an affidavit of the non-mineral character of the land made in support of a homestead entry, although a regulation of the Land Office requires such an affidavit to be made in certain States, since it is not required by Revised Statutes, sec. 2290, which prescribes the contents of a homestead affidavit, and the statute can not be added to for criminal purposes by a departmental regulation." And the court in his opinion, at page 653, further said:

> "in the case at bar materiality of the affidavit set out in the indictment and its authorization by a law of the United States are essential elements of the crime cited to be charged. To hold that said elements exist when there is no statutory requirement or authority for the affidavit, and solely because of rule 24, above mentioned, assuming now that said rule is not repugnant to any act of Congress would make the rule a part of the law defining perjury, and thus admit what all the authorities deny,—legislative power in the executive branch of the Government."

Citing United States *vs.* Eaton, 144 U. S., 677; Morrill vs. Jones, U. S., 466, 467.

In Braeutigam *vs.* State, 42 Atl., 748; 63 N. J. Law, 38, it was held that an indictment charging the defendant with perjury in making and filing

a false affidavit as to any material question in the pending action in a court of competent jurisdiction, describes no offense inasmuch as the affidavit was not admissible as evidence and could have no probative force.

This court in the recent case of Williamson *vs.* United States, 207 U. S., 425, as we understand that decision, has effectually settled the question that perjury cannot be predicated upon an affidavit filed in the matter of an entry of public lands if such affidavit was not required or authorized by the statutes governing such entry. In that case the defendants were indicted in the District Court of the United States for the District of Oregon for conspiracy to commit the offense of subornation of perjury. Objection and exception was taken to the admission of certain evidence tending to show that it was the purpose of the conspiracy to have the entrymen of certain lands under the Timber and Stone Act make affidavit at the time of their final proof that they had not prior to the time of making such final proof directly or indirectly made any agreement or contract in any way or manner with any person to sell or dispose of said land, and to an instruction of the court substantially to the effect that such an affidavit would constitute perjury. It was held on the appeal to this court that the admission of such evidence and the giving of said instruction constituted reversible error; that the Timber and Stone Act "does not require affidavit before final certificate that

no interest in the land has been sold. We perceive no reason why such contract as was found to exist by the Supreme Court of Oregon would vitiate the agreement to convey after the certificate is granted and the patent issued." And the court concludes as follows:

> "As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of final proof was irrelevant, even under the particularly broad rule which we have previously in this case applied, and therefore *that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the land. Reversed and remanded.*" (Italics ours.)

Respectfully submitted,

L. H. VALENTINE,
NATHAN NEWBY,
Counsel for Defendant in Error.

Supreme Court, U. S.
FILED
Apr 3, 1911
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1909.

No. 314

United States of America,
Plaintiffs in Error,
vs.
William B. Hammers,
Defendant in Error.

Brief of Oscar A. Trippet, J. M. Eshleman, Le Compte Davis and Wm. C. Prentiss as Amici Curiæ in Support of the Government's Appeal in this Case.

OSCAR A. TRIPPET,
J. M. ESHLEMAN,
LECOMPTE DAVIS &
WM. C. PRENTISS,
Amici Curiæ.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

IN THE

Supreme Court

OF THE

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OCTOBER TERM, 1909.

No. 581.

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vs.
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Defendant in Error.

Brief of Oscar A. Trippet, J. M. Eshleman, Le Compte Davis and Wm. C. Prentiss as Amici Curiæ in Support of the Government's Appeal in this Case.

STATEMENT OF CASE.

This brief is in support of two legal propositions:

First. That a person has a legal right to make a desert land entry without intending to personally reclaim the entered land by conducting water thereon; or in other words, he has the legal right to make a desert land entry intending to sell or assign his entry to any qualified assignee whenever a favorable opportunity offers.

Second. A desert land entry may be assigned at any time after it is made, and reclamation and proof of reclamation may be made by the assignee.

Upon this last proposition the government agrees with us and the defendant opposes our view. Upon the first proposition we understand both the government and the defendant Hammers are opposed to our position—the defendant naturally, because such position is in conflict with and largely destructive of his main position,—that a desert land entry cannot be assigned until after completion of reclamation of the entered land. We naturally presume the government will oppose this view, from the fact that the government is committed to and is contending for a contrary view of the law in the case of U. S. v. Chaplin, now pending before the Circuit Court of Appeals for the Ninth Circuit—the government in that case having argued in the trial court and by such argument persuaded said court (Judge Wellborn, the same judge who decided this case against the government) to hold that a desert land

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entryman at the time of entry must *intend* to personally reclaim the entered land, and cannot *intend* to sell or assign his entry before completion of reclamation, and if the court in this case were to hold otherwise, such decision—while it might be decisive of this case in the government's favor—would be fatal to the contention of the government in the Chaplin case, and a complete defense to that case. We believe that the government's contention and the lower court's decision in the Chaplin case is unsound and cannot be maintained, and that the error therein is responsible for the same court's error in this case; and that the error in the ruling in this case cannot be successfully overthrown while contending for the soundness of the same court's ruling in the Chaplin case; as the government having convinced the lower court in the Chaplin case that a desert land entryman must *intend* to personally reclaim the entered land, and cannot *intend* to sell or assign his entry before completion of reclamation, the next step, and the logical step for that court to take was the step which it did take in *this* case, namely, to hold that the desert land entryman—being bound to *intend* to personally reclaim—must *actually* personally reclaim the entered land, and—as the entryman could not *intend* to assign before reclamation—that he could not *actually* assign his entry before the completion of reclamation, and that the as-

signee could not reclaim the land or make proof thereof.

It will thus be seen that the contention of the government in the Chaplin case precludes it from making here the argument necessary to refute the most formidable argument advanced by the defendant Hammers. For instance, the defendant Hammers, we understand, will maintain that the original entryman alone can reclaim the entered land, *because* the law requires that he shall *intend* to reclaim, and that the entryman cannot assign before reclamation, *because* he cannot at the time of entry *intend* so to do; that it would be futile to exact an *intent* to personally reclaim if one need not *actually* personally reclaim, and that it would be useless to prohibit an *intent* to assign and yet to permit *actual* assignment, in disregard of such intent. In support of the position that the entryman must *intend* to reclaim, and cannot *intend* to assign, defendant Hammers cites and relies upon the government's contention and the lower court's decision in the Chaplin case; and we submit that so long as the government maintains that such contention and such Chaplin decision are sound, it will be very difficult, if not impossible, to avoid the conclusion reached by the defendant Hammers in this case. The government must answer the queries propounded by the defendant Hammers, namely: Why compel one to *intend* to per-

sonally reclaim, if he need not *actually* personally reclaim? Why prohibit one from *intending* to sell or assign, if he may at once *actually* sell or assign, regardless of such intent?

In our judgment, the answer to this argument of defendant Hammers is very simple, and is, that the entryman need not at the time of original entry, *intend* to personally reclaim the entered land, and need not *actually* personally reclaim; that he may at the time of entry *intend* to assign before reclamation, and may *actually* assign before reclamation; that the law permits him to *do either*, and to *intend* to do either.

HISTORY OF THIS CASE.

The following brief history of this case and of the Chaplin case will contribute to a better understanding of the arguments and briefs in this case. The facts are as follows:

Upon July 12, 1909, the District Court of the United States for the Southern District of California, Southern Division (Honorable Olin Wellborn, judge), in the present case of U. S. v. Hammers, sustained a demurrer to an indictment for perjury, based upon the falsity of an affidavit of first annual proof made by an assignee of a desert land entry; the affidavit alleging the expenditure by such assignee of one dollar per acre during the first year after such entry in reclaiming from its desert state the land in question. The lower court

held that as the law did not permit a desert land entry to be assigned prior to the completion of reclamation, an oath by the assignee prior to the completion of reclamation showing money expended by him in reclamation was not authorized by law, and hence, perjury could not be predicated upon the falsity of such an oath; therefore, the demurrer to the indictment was sustained by the lower court. The government appealed from such decision to this court and the question directly involved here is "Can an entryman of desert land lawfully sell or assign his entry before completion of reclamation of the entered land?" Upon this appeal counsel for defendant Hammers will maintain that a desert land entry cannot be lawfully assigned until after the completion of the reclamation of the entered land, and as one of the reasons for so claiming, such counsel will maintain that this cannot be done, because section 1 of the original desert land act requires that a desert land entryman must at the time of original entry *intend* to personally reclaim the entered land, *therefore* he must *actually* personally reclaim such land, and cannot assign it before reclamation, and that reclamation cannot be made by the assignee, and proof of reclamation cannot be made by the assignee.

The government, on the other hand, will maintain that the entryman may lawfully assign his entry at any time after it is made and before the com-

pletion of the reclamation, and that reclamation may be made by the assignee and proof of reclamation made by the assignee. The government, however, will, we are informed, concur in the construction placed by defendant Hammers upon section 1 of the original desert land act, and will concede the claim made by the defendant Hammers that the desert land entryman must at the time of original entry intend to personally reclaim the entered land, and cannot intend to sell or assign his entry before the completion of reclamation; and the government is contending for and urging this position in the case of U. S. v. Chaplin, now pending in the Circuit Court of Appeals for the Ninth Circuit, the government having succeeded in convincing the lower court in that case to so hold, and it has so held; and such decision is now being cited by the defendant Hammers in this case, as sustaining his argument here. It will therefore be seen that upon this question of the necessity of the entryman's intent to personally reclaim at the time of original entry, the government and the defendant Hammers will both maintain that such intent is essential to a valid entry.

The Case of United States v. Chaplin.

On the same day upon which the lower court rendered its decision in this Hammers case—namely, upon July 12, 1909, immediately prior to rendering such decision, the same court (Honorable Olin Wellborn, judge) also rendered the decision in the case of U. S. v. Frank N. Chaplin *et al.*, above mentioned, overruling a demurrer interposed to an indictment charging the defendants therein with conspiracy to defraud the United States of the use and possession of and title to certain desert lands in the Imperial Valley in California, under the provisions of the United States desert land laws. The indictment in such case charges that the defendants had conspired to induce parties to make desert land entries who would not *intend* at the time of making such entries to reclaim the entered land by conducting water thereon within four years. The demurrer to the indictment raises the point that the law does not require a desert land entryman at the time of entry to *intend* to personally reclaim the entered land by conducting water thereon within four years; but that such an entry could be lawfully made although the entryman intended to sell or assign the entry to any qualified assignee at the first opportunity offered; and hence it is claimed by the defendants in that (the Chaplin) case, that a conspiracy to cause desert land entries to

be made by parties who would not intend to personally reclaim the entered land, but who would intend to sell or assign their entries before the completion of reclamation, whenever an opportunity offered, is no offense. This position the lower court rejected, and the demurrer to the indictment was overruled. The case came on for trial and the defendants Frank N. Chaplin and David H. Chaplin were found guilty as charged, and were sentenced to a fine and imprisonment. The case was taken upon writ of error to the Circuit Court of Appeals for the Ninth Circuit, and is now pending in such court awaiting hearing. The bill of exceptions in the case waives all questions except those raised by the demurrer to the indictment. This brief, as *amicus curiae*, is in the interest of defendants Chaplin and David H. Chaplin, in such case, as the decision of this court will materially affect the law governing the rights of the defendants in that case. Our position and that of the parties to this case is, briefly, as follows:

Contentions of the Parties Stated and Contrasted.

We claim that an entryman need not personally reclaim *nor intend* to personally reclaim the entered land, but may assign and *intend* to assign, and that the assignee may lawfully reclaim; the appellee Hammers in this case claims, as we understand, that the entryman must *both* re-

claim and intend to reclaim, and cannot *either* assign or intend to assign, and that the assignee cannot lawfully reclaim or make proof thereof; the government claims that the entryman need not *actually* reclaim but must *intend* to reclaim, and that the entryman *can assign* but *cannot intend to assign.* It will thus be seen that we differ from both the appellee and the appellant, in that we maintain that an entry need not be made with the intention of personally reclaiming, but may be made with the intention of assigning, and that we agree with the government and differ with the appellee in that we hold that an entryman need not actually reclaim, but that an entry may be assigned, and that reclamation may be made by an assignee, direct or remote, of the entryman.

The decision of the lower court in this case and in the Chaplin case harmonize perfectly with each other, but in our opinion both are unsound, and rest upon the false hypothesis that the right to assign a public land entry only exists when expressly conferred by statute.

The government holds that an entryman *may lawfully assign*, but cannot lawfully *intend to assign;* that the *act of assignment* and the *right to assign* are legal, but the *intent* to exercise this legal right is *unlawful or criminal.*

The lower court probably saw—what seems so obvious to us—how untenable this position of the

government was, and realized that to *concede the right to assign* and to *deny the right to intend to assign*, was wholly without reason, as the *intent* to do a *lawful* thing, to exercise a *lawful* right, cannot be *criminal;* and to escape from this illogical position, the court—as its own language in this case shows—being under the erroneous impression that the right of assignment does not exist unless expressly conferred by statute, and being much impressed with the force of what it calls the "unequivocal" landguage, "he intends to reclaim, etc.," occurring in section 1 of the old desert land statute, naturally argued that Congress would not exact an *intent* to reclaim, and then permit such intent to be immediately disregarded, by allowing the entry to be at once assigned before reclamation; so, to prevent this paradoxical result, it was held that actual reclamation by the entryman himself was contemplated by Congress, hence he was required to *intend* to reclaim, and that he could not *intend* to assign before reclamation, because he could not *actually* assign before reclamation. To avoid holding that it is criminal to *intend* to do what one has a legal right to *actually* do, the lower court has been driven by irrefutable logic—based, however, as we think, upon erroneous premises—to upset the construction which has been placed upon the desert land act by the Land Department for eighteen years, and to hold that a desert land entryman must *both intend* to person-

ally reclaim and must *actually* personally reclaim the entered land by conducting water thereon within four years, and that he could not *intend* to assign and could not *actually* assign his entry until after the completion of reclamation; and that an assignee could not reclaim or make proof of reclamation,—thus invalidating thousands of desert land entries now held under assignments before completion of reclamation. All of which might, in our judgment, have been easily avoided had the court followed the well established doctrine *that the right of assignment exists unless expressly prohibited by statute*, and that this right not being expressly prohibited by the desert land act, the entryman has the legal right to assign before reclamation, and consequently has the right to *intend* to assign before reclamation.

It will be seen that the lower court by its decision in this case, and in the Chaplin case, has brought about an anomalous condition of affairs, namely: under the existing practice of the Land Department, uniformly prevailing for eighteen years, assignments of desert land entries are allowed at any time after entry, and assignees are permitted to reclaim and to make annual proofs of expenditure and final proofs of reclamation, and patents are issued to assignees; notwithstanding this, under the decision of the lower court in this case an assignee may, with impunity, swear falsely as to expenditure and reclamation—*the*

very vital essential features of the law—and yet be immune from all criminal prosecution for perjury; yet, as decided by the lower court in the Chaplin case, if an entryman, relying upon the practice prevailing in the Land Department for all these years, makes an entry, merely *intending* to assign it before reclamation,—as by the Land Office practice he has for eighteen years been permitted to do,—he is guilty of perjury, and those who advise and persuade him to so do are guilty of conspiracy to defraud the United States.

In the discussion of our first point, viz.: the right of an entryman to make a desert land entry *without the intention of personally reclaiming the land* by conducting water thereon, we will assume the law to be as stated by Mr. Justice Field in St. Louis etc. v. Kemp, 104 U. S. 636, that

> *"Every interest in lands is the subject of sale and transfer unless prohibited by statute, and no words allowing it are necessary."*

And we will also assume that the Supreme Court of California correctly announced the law in Rose v. Nevada, 73 Cal. 385, when, in referring to the right to assign a soldiers' additional homestead right, it said:

> *"It (the right of assignment) need not be granted by the sovereign authority, for it exists, if not expressly prohibited by statute or opposed to public policy."*

We pause here to remark that, in our opinion, the error of the lower court, both in deciding this case and in deciding the Chaplin case (to which it is so closely allied) rests upon the lower court's failure to grasp the full meaning of the above ruling that the right of assignment exists unless expressly prohibited, and that such a right need not be expressly allowed by statute. We think this is apparent from the following language of the lower court in its decision in this case, namely:

> "If Congress had intended to confer the right of assignment during the progress of the work of reclamation, it would have inserted after each reference to the entryman, in some appropriate way, the words, 'or his assignees.'"

From this language it will be seen that the lower court approached the decision in this case with an entirely erroneous premise, and necessarily its conclusions based thereon are erroneous.

In our discussion of our first point as to the right of a desert land entryman to make entry *without intending to reclaim* the land by conducting water thereon, we will, for the time being, assume, without demonstrating, that the Desert Land Act, as amended in 1891, expressly recognizes the right of the desert land entryman to assign his entry at any time after it is made, and authorizes reclamation to be made by the assignee and patent to issue to the assignee; and we shall

likewise assume that such has been the well established construction, uniformly placed upon the amended Desert Land Act by the Land Department ever since the act was amended, in 1891. All of these assumed positions we expect to establish and demonstrate later, under the second subdivision of this brief.

In the advance draft of the brief of defendant Hammers upon this appeal, which has been handed us, it will be noticed that the defendant relies largely upon the language of section 5 of the amended Desert Land Act of 1891, as showing that the "parties so entering shall expend" the necessary one dollar per acre each year in reclamation, and shall each year make proof thereof. To emphasize this language, however, the appellee invokes the language of section 1 of the original Desert Land Act of March 3d, 1877, exacting an oath of the original entryman to the effect that "he intends to reclaim, etc.," from which appellee argues that as the entryman must "*intend to reclaim*", it follows that he must *actually* reclaim and cannot assign before reclamation. In support of this position that the law requires that an entryman must *intend* to reclaim, appellee cites, quotes from, and relies upon the decision of Judge Wellborn in the case of U. S. v. Chaplin, already mentioned, so holding. As such case of U. S. v. Chaplin does clearly so hold, and as we believe that the conclusion reached by

the court in the Chaplin case is erroneous, and unsound, our argument here shall be addressed chiefly to refuting the lower court's conclusions in the Chaplin case, the forerunner of and the logical antecedent of this case.

ARGUMENT.

FIRST.

We Maintain that a Person has the Legal Right to Make a Desert Land Entry Without Intending to Personally Reclaim the Entered Land by Conducting Water Thereon; or, in Other Words, he has the Right to Make a Desert Land Entry Intending to Sell or Assign his Entry to any Qualified Assignee Whenever a Favorable Opportunity Offers.

The government claimed in the Chaplin case, and the lower court held, that a desert land entryman must, at the time of original entry, *intend* to reclaim the entered tract by conducting water thereon. This position is based upon the language of section 1 of the original Desert Land Act of March 3rd, 1877, which provides that it shall be lawful for any citizen, upon the payment of twenty-five cents per acre, to file a declaration under oath in the Land Office which should state

> *"that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within the period of three years thereafter.* * * * At any time within the period of three years after

> filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: Provided, however, that no person shall be permitted to enter more than one tract of land not to exceed six hundred and forty acres, which shall be in compact form." (We print in the appendix to this brief, for the convenient reference of the court, both the original Desert Land Act of 1877 and the amendments of 1891.)

The italicized portion of the above section, it is maintained by the lower court in the Chaplin case, requires that a desert land entryman must intend to reclaim the entered land by personally conducting water thereon. This court will notice that under the above provision of the Desert Land Act, a full section, or *640* acres of land, may be entered, and that it must be reclaimed within *three* years, and that the entry may be kept alive for *three* years without any showing of diligence or expenditure of money in reclamation work. The act is silent as to the right of assignment. The Land Department, after a number of conflicting decisions, finally decided that the right to assign an entry did not exist, and this continued to be the construction placed upon the act by the

Department for more than ten years, and until the act was amended in 1891.

On March 3d, 1891, the Desert Land Act was amended by adding thereto five new sections. The *language* of the old sections remained unchanged, but the *meaning* of the old law was changed in very material respects. The area enterable was cut down from *640* to *320 acres*, the time allowed for reclamation was extended from *"three"* to *"four"* years, *assignments were expressly recognized*, and the expenditure of one dollar per acre was required each year for three years in reclamation work; and proof thereof by affidavit filed in the Land Office, was exacted; and upon failure to make such proof of expenditure each year, it was provided that the 25 cents advance payment to the government should be forfeited and the entry cancelled. The Land Department has uniformly held since such amendment was enacted, that a desert land entry was assignable at any time after the original entry was made, and that the work of reclamation could be done, and proof thereof could be made, by the assignee, and that patent would issue to the assignee, and thousands of such assignments and proofs and patents have been allowed. The alleged conspiracy in the Chaplin case occurred more than ten years after the Desert Land Law was thus amended in 1891, so that case necessarily rests upon the amended statute.

In the course of the lower court's opinion in the Chaplin case, the judge says:

> "It is impossible for me, in the face of the provisions of the Desert Land Act, which positively and unequivocally prescribe as the first step in proceedings to acquire desert land, a declaration by the entryman, under oath 'That he intends to reclaim said tract by conducting water upon the same,' to do otherwise than hold, that for a person to knowingly make this declaration when he does not at the time of making it intend so to reclaim said tract, not only imports moral obliquity, but is a fraud upon the government, and that a combination of two or more persons to perpetrate said fraud, is a conspiracy, within the meaning of section 5440 of the Revised Statute."

We respectfully submit that the lower court did not quote or consider enough of the statute in question. Section 1 of the statute provides that it shall be lawful for any citizen, upon payment of 25 cents an acre, to file a declaration under oath "that he intends to reclaim a tract of desert land not exceeding *one section*, by conducting water upon the same within the period of *three* years thereafter." Now, that is the whole thing that the entryman is to swear to. That language has never been changed. It is unequivocal, it is not ambiguous in any sense. The entryman is required by this section 1 to swear that he intends to reclaim "not exceeding *one section*" of land by conducting water thereon within "*three*"

years. Now, we have quoted the whole of that sentence, and if we made a retranscript of the court's proposition and underscore the additional language that we deem necessary to understand this situation, it would read this way:

> "It is impossible for me, in the face of the provisions of the Desert Land Act, which positively and unequivocally precribe, as the first step in proceeding to acquire desert land, a declaration of the entryman, under oath, 'that he intends to reclaim a tract of desert land not exceeding *one section* by conducting water upon the same within the period of *three* years thereafter,' to do otherwise than hold that for a person to knowingly make this declaration when he does not, at the time of making it, intend *so* to reclaim said tract, not only imports a moral obliquity, but is a fraud, etc."

Now, the lower court's language applies to that whole quotation, equally with the part quoted by the court, because this language is not uncertain, it is not ambiguous; that is the first section of the act. Now, the point we wish to make is this: That although the act, as amended in 1891, only permits a man to enter *320* acres and allows *four* years for its reclamation, nevertheless, the language of section 1 of the old act remains, upon its face, unchanged, and still requires a declaration of the entryman, which says, "he intends to reclaim a tract of desert land not exceeding *one section*, by conducting water upon the same within the period of *three* years thereafter," although

the amendment allows *four* years and only *half* a section of land. It is perfectly clear that, as the amendment allows *four* years to reclaim, the entryman is no longer required to swear that he intends to reclaim in *three* years, and as the amendment only allows him to enter *half* a section, he is no longer permitted to enter a *whole* section, or to swear that he intends to reclaim a *whole* section.

Although the language of section 1 of the old act still says *three* years, and not exceeding *one* section, this language is *manifestly modified and controlled* by the language of the amendment, which allows only *half* a section and gives *four* years for reclamation. This is self-evident and it is too plain to require argument. It is no plainer or clearer, however, in our opinion, than the fact that the amendment clearly allows an entryman *to assign his entry* at any time after the entry is made; and the Land Department has uniformly held that the amendment permits assignment at any time after entry, and permits reclamation by the assignees, and patents to issue to assignees; so that, no matter what was the proper construction of the *old* law, before the amendment, *since the amendment an entryman may assign his entry at any time after the original entry;* and just as the language of section 1 of the old act must now be read a *half* section, instead of *one* section, and *four* years, instead of *three*, so the language,

"he intends to reclaim, etc.," must be read "he intends to reclaim a tract of desert land not exceeding *320* acres by conducting water thereon within a period of *four years, or to assign the same to some qualified assignee,"* as the amendment clearly permits him to either personally reclaim, or to assign, and he may *intend* to do *either*.

When the amendment was passed, in 1891, the Land Department promptly changed the old printed forms of declaration kept at the local U. S. Land Offices and given out for use by intending entrymen, by changing *"one section"* to "half a section" and "three" to "four" years, but failed to insert the words, "or to assign to some qualified assignee," as should have been done to make it conform to the right of assignment conferred by the amendment, and to the department's interpretation of the amendment as permitting an assignment at any time after the original entry, and as permitting the reclamation to be made by the assignee.

Because the amendment allows *four* years to reclaim instead of *three*, the Land Department was justified in changing the declaration to read "four" years instead of "three," and as the amendment permits the entryman to assign before reclamation and permits reclamation by the assignee, so the declaration should have been changed accordingly so as to provide that the entryman intended *either to reclaim or to assign*.

The printed forms of desert land declarations prepared and furnished by the Land Department, to be sworn to by the applicant to enter desert lands, in use from the time the Desert Land Act was amended in 1891, up to a time long after the date of the conspiracy attempted to be described in this indictment, at one place states that the applicant intends to reclaim within "four" years, and at another place says within "three" years; thus showing that when the law was amended in 1891, giving four years instead of three years within which to reclaim, the old form of declaration was carelessly corrected, and the word "four" was inserted where the word "three" first occurs, but the correction to conform to the amendment was not made where the word "three" occurs on the last line of the declaration. (See printed form of desert land declaration on pages 295-296 of the General Land Office circular, issued Jan. 25, 1904, and page 292 of General Land Office circular, issued July 11, 1899, being the same form of desert land declaration, Blank No. 4-274 referred to in the indictment in the Chaplin case.) The conflict in the language of the declaration referred to, is as follows: In the beginning, the declaration says, "I intend to reclaim a tract of desert land not exceeding one-half section, or 320 acres, by conducting water upon the same within *four* years from the date of entry, in the manner as required by the act of Congress,

etc." The last two lines of the declaration, however, read as follows:

> "My declaration is made for the purpose of faithfully reclaiming the land above described by conducting water thereon within *three* years from the date of entry."

Thus we see that ever since 1891 desert land entrymen have been required to swear to this declaration, saying that their purpose was to reclaim the entered land within *"three"* years, when the statute clearly allowed them *"four"* years. This but emphasizes the danger of looking to the language of Land Office forms instead of to the statute itself when we wish to know what the law is. If the entryman intended to do what the law permitted him to do, he was within his legal rights regardless of what the Land Office form may have required him to swear that he intended to do; and as we have already explained, this applies as well to the question of his intention to *assign* as it does to the *time* within which reclamation must be made; and if the statute permits him to assign, he may make his entry with the intention of availing himself of his statutory right of assignment, regardless of the language of the form of declaration prepared by the Land Office.

The truth, however, probably is, that from the time the law was amended in 1891, until about the time the prosecution in the Chaplin case was instituted, neither the Land Department nor any-

one else, ever imagined for a moment, that it was at all material whether a desert land entryman intended to reclaim, or to sell or assign his entry to some qualified assignee; for the reason that *he was accorded by the Land Department the legal right to either reclaim or to assign,* just as he chose, and it was always supposed that he had a right to *intend* to do *either.*

The court's attention is invited to the line of reasoning of the lower court contained in the following extract from the opinion of the lower court in the Chaplin case (see transcript of appeal in Chaplin case, page 88, which transcript we furnish the court as the case has not been printed in the reports):

> "Suppose, for illustration, that an applicant for a tract of desert land presents to the register and receiver of the district where the land lies, as his declaration, a sworn statement, declaring, among other things, that he does not intend to reclaim the land, but that his purpose is to assign his entry, said statement, in other respects conforming to the Desert Land Acts. Can there be any doubt as to the official action that would be taken on such an application? Unquestionably, the proposed declaration and entry would be at once rejected and refused, because of their repugnancy to the plain requirements of the law."

We submit that this conclusion of the court utterly disregards the provision of the law as amended, which gives the entryman *the right to*

either reclaim, or to assign his entry; and we submit that if the language of the lower court is sound in reasoning, it would be equally sound to say that if a sworn statement or application to make desert land entry should have declared, among other things, that the applicant did not intend to reclaim the land within "three" years, but did intend to reclaim the land within "four" years, his statement in other respects conforming to the Desert Land Act, that the register and receiver must unquestionably have rejected and refused such application, because of its repugnancy to the plain requirements of the law; as the language upon which the court relies, namely, section 1 of the old act, only allows "three" years within which to reclaim the land. The amendment to the statute, however, as we have already shown, distinctly allows "four" years. The amendment to the statute likewise distinctly allows and recognizes the right *to assign* desert land entries, and the department has uniformly conceded such right. The extension from "three" to "four" years within which to reclaim, is no more clearly allowed by the amendment, than the *right of assignment* is clearly recognized by the amendment; and if it be true that a party has no right to make entry with the intention of assignment because of the particular language of the *old* statute upon which the court relies, it is likewise true that he has not the right to make entry

if he intends to give himself the full *four* years authorized by the amendment within which to reclaim the land; and if his entry should be rejected because he intended to assign rather than to personally reclaim it should also be rejected if he did not intend to reclaim within three years but intended to reclaim within four years. Yet the Land Office has never had any hesitation in striking out the word "three" and inserting the word "four," because "four" years is clearly allowed by the amendment to the act; and it follows that the Land Office was and is equally authorized to insert, and should have inserted in the declaration, the purport of the amendment on the subject of assignment, showing an intent to either reclaim *or to assign*, as allowed by the amendment to the act.

When the Act of 1891 was passed, the Land Department adopted a form of oath to be taken by assignees, showing they were qualified to become assignees, and the Land Department prescribed forms for an assignee to prove that he had expended the one dollar per acre each year for three years in reclamation of the land.

This court will take judicial notice that the Land Department has, ever since the act was amended in 1891, recognized the assignability of these entries from the time a man made his entry, and has recognized the right to assign these entries the next minute after they were

made, and has recognized the right of the assignee to make reclamation and obtain patent.

Responding further to the statement in the opinion of the lower court in the Chaplin case, to the effect that if an entryman should state in his declaration that he did not intend to personally reclaim the land but intended to sell or assign his entry before reclamation, that the register and receiver of the Land Office would undoubtedly reject such a declaration and deny the entry,—we submit that if such declaration were refused by the land officials, their action would be clearly contrary to law, and in violation of the legal rights of entrymen.

We maintain that an entryman has a perfect legal right to go to the Land Office and say, "I wish to enter a half section of desert land. I will pay the 25 cents an acre first installment upon the purchase price, and I will sell or assign my entry tomorrow, or at any time thereafter, if I can do so at a satisfactory profit; it may be that my assignee will reclaim the land, and it may be that he will not. He may assign it to someone else or he may abandon it, altogether; but if it is not reclaimed, if the dollar per acre is not spent the first year, and the second year, and the third year, and proof thereof made each year, and if the land is not fully reclaimed and the balance of the purchase price paid by the end of the fourth year, the advance money of 25 cents per acre paid the

government will be forfeited and the entry cancelled." This is the penalty expressly provided by the statute. The statute gives the entryman and his assigns the exclusive option to purchase upon certain prescribed terms, with the proviso that all rights shall cease, and the money paid be forfeited for failure to comply with the prescribed terms of the sale. The money paid the government is lost, and all the money expended in reclamation is lost, if the amount of money required by the act is not expended in the time specified, and the land fully reclaimed and fully paid for within the time prescribed. It is wholly immaterial to the government whether the entryman or his successor reclaims the land. The only guarantee of good faith the government has, and the only assurance of reclamation that the government has, is the loss that the entryman or his successor will sustain if the land is not reclaimed, and the prospect of gain to the entryman or his successor, if the land is reclaimed. The mere *intention* to reclaim of the original entryman, is an insignificant factor as an assurance of reclamation, as compared with the loss that will result from a failure, or the benefits that will follow from the success of the reclamation.

The only bad effect, or serious consequence, which the government or the court below claims would follow our interpretation of the statute is that it would permit the desert lands of the United

States to be tied up indefinitely for speculative purposes. See the opinion of Judge Wellborn, page 105 of the transcript in the Chaplin case, where he says:

> "Certainly it was not the purpose of Congress to allow a person to tie up indefinitely the possession of desert land, thus excluding all other persons from them, without any intention to reclaim, but solely for speculative purposes."

We submit that the statute, especially as amended in 1891, does not permit land to be tied up *"indefinitely"* without reclamation. Under the amendment of 1891, the *"intention"* of the entryman is not accepted as the badge of good faith, or as the evidence of diligence in reclamation, required by the law as a condition of holding the land; on the contrary, the statute (both the Act of 1877 and the amendment of 1891) requires an initial payment on the purchase price of twenty-five cents per acre, as earnest money showing the good faith of the entryman; and the amendment of 1891 requires an expenditure of one dollar per acre each year for three years in reclamation of the land, and its complete reclamation within four years, and that an affidavit be filed *each year* showing such annual expenditure; and the statute expressly provides that upon a failure during any year to file such affidavit of expenditure, *"the land shall revert to the United States, and the twenty-five cents advance payment shall be*

forfeited to the United States, and the entry shall be cancelled." See section 5, amendment of 1891. The small consequence in the mind of Congress of the *intention of the entryman* as an assurance of reclamation, is made apparent by this language of the statute. Good intentions, unaccompanied by the work of reclamation, were of no avail. Even assuming that, under the *old act*, the language "he intends to reclaim," etc., was intended by Congress as some guaranty that the desired reclamation would be forthcoming, this guaranty proved a broken reed, an utter disappointment, and resulted, in many cases, in the land being tied up for the entire three years with nothing accomplished toward reclamation; and Congress became impressed with the futility of a statute which permitted such a result, and which was construed by the department as tieing the hands of the entryman and preventing all barter and sale of the entry, and which afforded no assurance of diligence in reclamation other than an original "*intent*" to reclaim. Hence the amendment to the statute in 1891, by which tieing up the land for a longer period than one year, without diligence in reclamation work, was made impossible, and by which the right of assignment of entries was clearly recognized.

While we maintain, that even under the old act, the intention of the entryman to reclaim was never intended to be material to his right of en-

try, yet, as the right to assign such entry was not expressly granted by the original law, and the department finally decided (wrongfully, as we think and as decided by the Supreme Court of California) that under the old law, such right of assignment did not exist, it might with much force be argued that as the entryman alone could reclaim, the intention to reclaim was (outside of the 25 cents per acre paid down) the only guaranty or assurance of subsequent diligence in reclamation work which the law contained, and therefore, the intention to reclaim was material and vital. But under the new law, as amended in 1891, which permits an assignee to reclaim, and which exacts diligence in reclamation—not by relying on the intention of the entryman, but by requiring the making of proof of specific expenditure annually and forfeiting the entry and the money paid if this proof of expenditure was not made, the entryman's intention to personally reclaim becomes an immaterial factor in the transaction.

Judge Wellborn, in the Chaplin case, holds that the Desert Land Act itself clearly and unequivocally requires an oath that the entryman intends to reclaim by conducting water on the land within four years; so the proper decision of the whole controversy depends upon what is the true meaning of the language in section 1 of the *old* Desert Land Act reading, "he intends to reclaim a tract

of desert land not exceeding one section, by conducting water thereon within the period of *three* years thereafter."

We maintain, first, that by the use of the language "he intends to reclaim, etc.," in the *old* Desert Land Act of 1877, Congress never intended to prevent desert land entries being made with a speculative intent; or that entries should be for the sole use and benefit of the entryman, as distinguished from the assignee of the entryman; nor did Congress intend to prevent sales or assignment of the entry before completion of reclamation, or to require *personal* reclamation by the entryman himself. And second, even if such had been the intention of Congress, under the *old* law,—which was entirely silent as to the right of assignment, and which did not expressly either authorize or prohibit assignments, and which was construed by the Land Department as not authorizing assignments,—such language cannot be so construed, since Congress, by the amendment of 1891, has expressly recognized assignments, and the Land Department has uniformly construed the law as amended to permit assignments at any time after the original entry.

We will first discuss the meaning of this language prior to the amendment of March 3, 1891, and then since the amendment of March 3d, 1891.

(A) The Meaning of the Language "He Intends to Reclaim," etc., in Section 1 of the Act of March 3, 1877, Prior to the Amendment of March 3d, 1891.

We claim that by using the language, "he intends to reclaim, etc.," Congress never intended to prohibit entries being made with a speculative intent,—that is, with the intention of selling or assigning at a profit before reclamation; and by using such language Congress did not intend that the entry should be solely for the use and benefit of the entryman in any way that would prohibit a *bona fide* sale or assignment before reclamation. Had Congress intended to prevent entries being made with a speculative intent, it would undoubtedly have prohibited such an intent by express and unmistakable language, as it did in the Pre-emption and Homestead Laws and in the Timber Culture and Timber and Stone Law, in each of which laws the entryman is required to make oath, substantially as follows: In the Pre-emption Law he is required to swear that he has not entered the land "to sell the same on speculation"; and in the Homestead Law to swear that he "does not apply to enter the same for the purpose of speculation"; and in the Timber and Stone Act the entryman is required to make oath that "he does not apply to purchase the same for speculation"; and the Timber Culture Law requires the entryman

to swear that his application "is not for the purpose of speculation." It is also significant that each of such laws,—the Pre-emption, the Homestead, the Timber and Stone and the Timber Culture Law,—requires the entryman at the time of making original entry to swear that the entry is for his own sole use and benefit, and not for the use and benefit of any other person or persons whatsoever, and that he has not, directly or indirectly, made any agreement by which the title which he may acquire will inure, directly or indirectly, to the benefit of anyone else than himself. (The full text of such portions of such laws is set forth and discussed later in this brief.) The absence of any such provisions in the Desert Land Act prohibiting a speculative intent, or requiring the entryman to swear that the entry is for his sole use and benefit and that he has not made any agreement for its sale, *is exceedingly significant*, and to our mind shows that Congress intended no such restraints upon the entryman's intentions. The reason for this marked difference in the Desert Land Act and in the acts just referred to is inherent, both in the character of the land offered, and in the purposes of the acts.

In the Desert Land Act the government was offering to sell land that was *absolutely worthless* in its offered state, and from which *nothing of value* could be taken by the purchaser without his creating that value by the expenditure of

many times the purchase price of the land. The purpose of the offer was to induce this expenditure upon the land, so as to thereby infuse value into that which before was valueless, and to transform the worthless desert which would produce nothing, into productive farms of great value. The cost of reclaiming desert land by irrigation, ranges all the way from ten to fifty times the purchase price paid to the government for the land; and the payment of such purchase price is an insignificant factor in the outlay required to render the land of any value to the purchaser.

The land, when reclaimed, is a national asset, a source of wealth worth hundreds and often thousands of times its value as desert land before reclamation. This is remarkably illustrated in the reclamation of the Imperial Valley in California, where this case arose, of which the court will take judicial notice, which valley, through the magic touch of irrigation and reclamation, brought about chiefly under the provisions of the Desert Land Act, today has over 20,000 people, over a thousand irrigated farms, over a thousand miles of irrigating canals, a number of live towns and lands worth over twenty millions of dollars, where ten years ago all was a barren desert waste, —upon a thousand acres of which, food could not be had sufficient to sustain either man or beast for a single season.

The reclamation of desert lands by irrigation is a most uninviting undertaking, accomplished under pioneering conditions, accompanied usually with great hardships and privations. It is an enterprise hazardous in character and uncertain in outcome, and requires a great outlay of money and a vast amount of time and labor; and there was every reason why Congress, in order to induce and promote such reclamation, should not have hampered the acquisition and transfer of title with unnecessary conditions, that would have tended to defeat or render more difficult the object in view, and which would secure no compensating advantage to the government.

That we may better understand the reasons influencing Congress in prohibiting a speculative intent and prohibiting agreement to sell in advance of entry in the Pre-emption and Homestead and Timber and Stone Laws, and in not doing so in the Desert Land Act, let us for a moment compare the laws, the purposes to be accomplished, and the character and value of the lands offered under each, as an aid to their proper construction.

Under the Timber and Stone Law, land is offered for sale by the government at $2.50 per acre, upon which timber ready for cutting and stone ready for quarrying is in many cases worth hundreds of dollars per acre; and under the Pre-emption and Homestead Laws the most fertile

and productive agricultural lands of the country have been acquired, where lavish nature waters the land and abundant crops respond to the ordinary arts of husbandry. In distributing among its citizens these valuable gifts of its bounty, it was but natural that Congress should have attempted to safeguard and protect the beneficiaries of such laws against being made the tools of, or being over-reached by the scheming machinations of greedy land grabbers, by compelling the entryman to make oath *that he was not entering the land for speculation, but for his sole use and benefit, and that he had entered into no agreement for its sale to others.* Such properties being valuable *per se* in their offered state, and such laws being framed chiefly for the benefit and protection of the entrymen themselves, and not for the sake of giving value to worthless assets,—as was the case with the Desert Land Act,—it was but natural that the government in its trustee or guardianship capacity, should have exercised a jealous care in trying to hedge round its bounty with every reasonable protection to prevent its citizens from being robbed of their birthright by scheming speculators. But the danger of an entryman of desert land being swindled out of his birthright by a schemer who has to expend for reclaiming the land from its desert state, as a condition of getting title, from ten to fifty times the government's price for it, is a danger that

does not render such a purchaser very apt to be victimized by those who are seeking to acquire something for nothing, or for a mere song. Such a purchaser is more effectually protected against the plundering proclivities of avarice, by the heavy initial cost of reclamation, which is a condition precedent to acquiring title, than the beneficiary of the government's bounty under the Timber and Stone and Pre-emption and Homestead Laws can possibly be, by any amount of restrictive laws, intended by the government to save the purchaser from being victimized.

Unlike the other acts of Congress, such as the Timber and Stone Act, and the Pre-emption and Homestead Laws, where Congress was offering land valuable *per se* in its offered state, the Desert Land Act offers a thing which, as offered, is worthless, and the condition of getting title, in addition to the payment of the purchase price, is the successful reclamation of the land, thereby giving value to it. This is to be done by the purchaser unaided by the government; and the success of the reclamation rests upon the initiative, the sound judgment, the efforts and the money of the purchaser, who takes all of the chances, and who has to bear all the losses if the projected scheme of reclamation fails.

The Desert Land Act is addressed to, and rests for its success upon, the speculative instinct of man. Men of conservative temperaments never

reclaim the desert. The optimistic and courageous spirit of the pioneer and adventurer, ever buoyant and hopeful, is required to conquer and reclaim the desert, animated by the hope of large returns if the undertaking is successful.

The success of an irrigation reclamation project dealing with desert conditions is dependent upon so many conditions—such as the adequacy and reliability of the proposed water supply, the title and right to the use of the water, the engineering difficulties to be encountered, the cost of constructing and maintaining the canal system, the amount of funds available to carry the project through, the productiveness of the soil after it is irrigated and its nearness to, or remoteness from a profitable market—that such projects are classified by bankers and financial institutions generally as of the most hazardous and speculative character; and to prohibit a desert land entry being made with a speculative intent would be to prohibit all desert land entries being made,—as they are all inherently and necessarily speculative in character.

As the purchaser runs all the risks of the purchase and the government none, and as the government parts with no title unless the land is reclaimed, why should Congress have hampered the offer of sale, or abridged its advantage by not allowing a sale before reclamation to someone who would step into the shoes of the pur-

chaser, and carry on his undertaking and complete the reclamation? What advantage was there to the government in thus limiting the advantages of its offer to the purchaser and making him lose his investment, if, through lack of funds or otherwise, he should be unable to carry his projected scheme of reclamation through to final success and consummation? Why not give the purchaser who has so much at stake—(the government having nothing at stake)—*the ordinary property right of alienation, of sale and transfer, which always exists unless expressly prohibited?* The right to sell and dispose of property is one of the most valuable elements of property ownership. Why should the government, which was anxious to bring about at the expense of others, the reclamation of its arid lands—an accomplishment of so much importance to the general welfare—withhold this valuable element of property ownership from those who accept the government's offer of sale and pay the government the earnest money of 25 cents per acre? Why should Congress require that such persons should not be animated by a speculative intent or that they should not sell or assign their rights until after reclamation is satisfactorily completed, and the project is proven to be a success? Why compel the original purchaser to stand all the risks to the very end of the undertaking? Why

not allow him to get new blood into his project, and to divide his burden?

As barter and sale are the very life blood of business and trade in the commercial and mercantile world, so in the acquisition and reclamation of arid lands, and in the building up of new settlements in arid regions, freedom to buy and sell lands is of the very life of such a project, giving new blood, new interest and new vitality to it. When we bear in mind the rule, so well established by the decisions of the courts of this country, *that the right to alienate title is an inherent right of ownership, that does not have to be expressly conferred by Congress, but which exists unless expressly prohibited;* and when we take into consideration all the special reasons that can be so strongly urged in favor of the right of a desert land entryman to assign and sell his entry, and to make an entry with the intention of either selling or reclaiming as he may please, it would seem almost impossible to believe that by using the words "he intends to reclaim," etc., Congress intended to prohibit the right to sell, *or to intend to sell* the entered land to a qualified assignee, who could step into the shoes of the entryman and whose rights would depend upon the consummation of the reclamation of the land, as authorized by the statute.

The original Desert Land Act is entitled "An Act to provide for the *sale* of desert lands" and

constitutes *an offer of sale* of the government's desert lands, in tracts not exceeding 640 acres to any one person, to those who will pay the government $1.25 per acre and reclaim the land through irrigation, within three years.

As the act does not provide that the purchaser shall not purchase with a speculative intent, and does not require that the purchaser swear that the purchase is for his own sole use and benefit, and does not require that he shall make oath that he has made no agreement in advance of entry to sell the entry, and is absolutely silent upon the question of assignment, and as the right of assignment is such a valuable right to the purchaser, and tends to promote rather than to retard or defeat reclamation, can it be presumed that Congress by using the language "he intends to reclaim," etc., intended to require the purchaser to intend to *personally* reclaim the land, and to prohibit the purchaser buying with the intention of selling or assigning his entry upon speculation; or to prohibit the purchaser from selling or assigning his entry until after the completion of reclamation? We think not. Then what did Congress mean by using such language—"he intends to reclaim," etc. We submit that the act of Congress constitutes the government's formal offer of sale of desert lands to all citizens at $1.25 per acre,—25 cents per acre paid down when the offer is accepted, and the balance in three years

thereafter, upon condition that the land be reclaimed by acquiring a water right therefor and conducting water thereon within three years, and that no one shall acquire more than one tract of land and not to exceed 640 acres, *and the offer contains no restrictions as to assignability of the right to so purchase such land.* The declaration required by the statute to be filed by the entryman with the register and receiver of the District Land Office is merely intended as a formal acceptance by the purchaser of the government's offer of sale as to the specific desert land described in the declaration. By filing such a declaration and paying the first installment of the purchase price, an executory contract of purchase and sale is made between the government and the purchaser, and we submit that by requiring the purchaser to say in such declaration that "he intends to reclaim" by conducting water on the land, Congress only thereby meant to commit the purchaser to an acceptance of the government's offer of sale upon the condition of conducting water upon the land and completing its reclamation within three years; and that Congress had no idea of requiring a *personal* reclamation, or of excluding the purchaser from selling or *intending to sell* his entry—or his right to complete the purchase,—to someone else who could step into his shoes and have the right to finish the reclamation and thus carry out the contract of purchase. Instead of

having the declaration of acceptance of the government's offer of sale, refer to the offer by date, volume and page of the statute, and read substantially as follows: "I hereby accept the government's offer to sell the following described desert lands as per offer contained in Act of March 3d, 1877, 19 Stats. 377." Congress saw fit to identify the acceptance of the offer by having the declaration of acceptance practically set forth the substance of the contract of sale, viz., by having it state an intention to reclaim the described land by conducting water thereon within three years. But we submit that so far as restricting the right to assign or to intend to assign the entry, the meaning of the declaration in no wise differs from what it would have been had it merely stated, "I hereby accept the offer of sale contained in the Act of Congress of March 3d, 1877—19 Stats. 377."

We do not for a moment believe that Congress ever meant this statement by the entryman, that he intended to reclaim a tract of desert land by conducting water thereon within three years, to mean anything more than the equivalent of a statement that he was accepting the government's offer of sale and applying to enter the land under the Desert Land Act of March 3d, 1877—19 Stats. 377, *which provides for the reclamation of desert land by conducting water thereon within three years.* On the contrary, we are satisfied

that this language is a mere substitute for the usual language so frequently required in land applications, intended to indentify the statute under which the proceedings was taken by reference to the date of the act, and the book and page of the statute. The language used served to state the purpose of the Desert Land Law of reclaiming land by conducting water thereon within three years, and therefore made a specific reference to the statute by date and by book and page unnecessary, and such language acted as a sufficient substitute for such a reference; but that the *intention* of the entryman to reclaim the land by *personally* conducting water thereon within three years was a *vital* or *essential* part of the right to enter the land, or of the right to a patent if the land was in fact reclaimed, as required by law, no one has, so far as we know, ever suggested until the question was recently raised for the first time in the Imperial Valley cases.

However, even though there may have been some doubt as to the proper meaning to be given to such language under the old statute before the right of assignment of entries was expressly recognized by the statute, as amended March 3d, 1891, there can, in our judgment, be no doubt since such time that it does not intend to exclude the right to intend to assign desert land entries.

(B) Meaning of the Language "He Intends to Reclaim," etc., Remaining in Section One of the Old Desert Land Act Since the Act was Amended in 1891.

From the language of both the original and the amended Desert Land Acts, it is evident that the *actual reclamation* of desert land was the purpose of such acts. Without it, no title could be acquired, and no amount of *intention* to reclaim was of any consequence. On the other hand, if the land was *actually reclaimed*, the intention of the entryman would be of no consequence. The payment of the twenty-five cents per acre at the time of original entry exacted of the entryman was all the evidence of intention, or badge of good faith required by the statute. It was sufficient evidence of his intention. Under the old act, which did not expressly allow assignments of desert land entries, there might be some possibility of holding that no assignments were intended to be allowed, and therefore that the reclamation must be made in person and not by an assignee; and that if an entryman was acting in good faith, he must have intended to reclaim the land by bringing water thereon within three years, as this—under the department's construction of the old law—would be the only means by which the entry could be made of any value to him, or by which the title could be acquired. The answer to this argument, however, is, that even

under a proper construction of the old law,—before the amendment, which expressly recognized the right of assignment,—*such right of assignment was not expressly prohibited, and was not opposed to the policy of the law*, and was therefore allowable, as was distinctly decided in Phillips v. Carter, 135 Cal. 604, referred to later in this brief, which decision is fully supported by the logic and reasoning of numerous cases in this court, which we shall cite.

But even conceding, for the purpose of the argument, that before the right of assignment of desert land entries was expressly recognized by the amendment of March 3d, 1891, that it might be held that the language in question in the old act, to the effect that the entryman intended to reclaim a tract of desert land by conducting water thereon within three years, could be construed as a statutory restraint upon the right of assignment, and therefore that the intent to reclaim was a material element in the right to make such a desert land entry, we cannot see how this helps the prosecution's interpretations of the Desert Land Act, as amended March 3d, 1891, which expressly recognizes assignments of desert land entries. It is true that the old language of the statute was not expressly changed, or the old act expressly repealed by the amendment, but the whole of the old act was permitted to stand untouched, and five new sections were added there-

to, changing the *meaning* of the old act in vital and material respects; and the old and new act must now be read together and harmonized, and so much of the old as is in conflict with, or incompatible with the provisions of the new, must be disregarded. In this connection we call the court's attention to the fact that section six of the amendment of 1891 expressly provided that "all acts and parts of acts in conflict with this act are hereby repealed." It would seem, therefore, perfectly clear that even if the language of the old act, as to the intention of the entryman, relied upon by the prosecution, ever did have the meaning now sought to be given it by the government, that since the amendment allowing assignments, cutting down the acreage one-half and extending the time for reclamation to four years, that the only proper reading of this particular language of the act in question would be as follows:

> "That it shall be lawful for any citizen of the United States, or any person of requisite age who may be entitled to become a citizen, and who has filed his declaration to become such, and upon the payment of twenty-five cents per acre, to file a declaration under oath with the register and receiver of the land district in which any desert land is situated, and that he intends to reclaim a tract of desert land not exceeding one-half section (instead of one section) by conducting water upon the same within four (instead of three) years *or to assign the entry made by him to any qualified assignee*, who has the right to

reclaim the land and thereby acquire title thereto."

Such would be a correct construction of the meaning of the statute as amended, and in entire harmony with its letter, spirit and purpose; and such has been the uniform interpretation of the Desert Land Act by the Land Department since the enactment of the amendment of 1891. It has been the crystalized practice of the Land Department in dealing with that statute to permit assignments of desert land entries *ad libitum*, so long as the assignee could show that he was qualified to receive the assignment, and would take the oath required of assignees by the Land Office showing that he did not own or hold, by assignment or otherwise prior to patent, more than 320 acres of such desert lands. And the records of the General Land Office (of which this court will take judicial notice) show that of the thousands of desert land entries made in the Imperial Valley, the great majority of them were assigned one or more times, and a large minority of them many times, before completion of reclamation, and all of such assignments have been allowed and approved by the Land Department *without regard to and without inquiry as to whether the entry was made with the intention of assigning it, or of personally reclaiming the land by bringing water thereon within four years.*

We submit that by no possible construction of the Desert Land Act, as amended—allowing, as it does, assignments at any time after the entry,—can it be said that the language of the old act above referred to now excludes the right to make desert land entry, unless the entryman intends to reclaim, and not to assign. But even if there could be any possible doubt upon this question,—considering the *strict language* of the statute alone,—so to construe the act, would be so contrary to the spirit, purpose and object to be obtained thereby as to materially defeat its beneficial purpose, and therefore such an interpretation should not be and never has been adopted.

Mr. Justice Story, in the case of U. S. v. Wynn, 3 Sumn. 209-221, laid down the true and controlling rule of statutory construction in such a case as this, in the following language:

> "It appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, *and to adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and object of the legislature.*"

That the "policy and object of the legislature" in passing the Desert Land Act, especially as amended, was to promote the reclamation of public lands, *either by the entryman or by his assignees*, there can be no question; and as that policy and object would be best promoted by per-

mitting the entryman to make entry with the intention of either reclaiming the land personally, or of assigning his entry to some qualified assignee who might lawfully reclaim it, the "purpose and policy of the legislature" will be best promoted by construing the language, "he intends to reclaim, etc.," to mean, "he intends either to reclaim the land or to assign his entry to someone who may reclaim it."

We submit that there can be no question of the fact that under the Desert Land Act, as amended March 3d, 1891, a person may enter a tract of land with the object, purpose and intention of selling, assigning, or disposing of his entry, as opportunity may offer. He is expressly authorized to assign his entry. It is not compulsory that his entry be made solely with the purpose of personally reclaiming the land by bringing water thereon within four years, although he has a perfect right to make an entry with the intention of so doing. As the act as amended expressly authorized assignments of entry, the *right of assignment* is the right which the entryman is entitled to have in mind at the time of making his entry, and this right may be the chief inducement to the entryman. In other words, the entryman might know at the time of making his entry that he was not so situated as to be able to personally reclaim the land in question, and did not have the financial means with which to do so; yet he might

believe that he could easily find parties who were able to do so, and would give him a satisfactory price or profit for an assignment of his entry, and he had a perfect right to enter the land and carry forward the work of reclaiming the land as far as his personal means or other circumstances would permit, relying upon the value which he could get from an assignment of such land, and intending to assign it, if favorable opportunity offered.

SECOND.

We Maintain that a Desert Land Entry May be Assigned at any Time After it is Made; and Reclamation and Proof of Reclamation May be Made by the Assignee.

(A) Language of the Desert Land Act Examined, Analyzed and Contrasted with the Language of Other Public Land Laws as to Restraints Upon Alienation of Entries.

As already stated, we maintain that the Desert Land Act, as amended March 3d, 1891, is fundamentally and essentially different from the other general agricultural land laws of the United States under which conspiracy and perjury prosecutions have heretofore occurred; in that it *alone* expressly permits assignments of entries without regard to the time when such assignments are made, or the amount of consideration

obtained therefor; whereas, the other general non-mineral land acts, except the Soldiers' Additional Homestead Law, not only do not *expressly permit assignments*, but *expressly prohibit them.* Some of such acts prohibit assignments only before *original* entry, namely, the Timber Culture Law and the Timber and Stone Act; others prohibit assignments up to final entry, namely, the Pre-emption and Homestead Laws. Being aware of the general rule of law which discourages all restraints upon the alienation of property, and which causes the courts to strictly construe all statutes placing any restraint upon the alienation of property rights, Congress has been careful wherever it has intended to place any restraint upon the alienation of land entries, to say so explicitly, and in unmistakable language, and has not left its purpose to be gathered from inference or from any doubtful language. We think this is clearly shown from the following comparison of the language of the several acts.

(1) The Language of the Desert Land Act.

On March 3d, 1877, Congress passed "An Act to provide for the sale of desert lands in certain states and territories." (19 Stats. 377.) Section 1 of this act provides that it shall be lawful for any citizen, upon the payment of twenty-five cents an acre, to file a declaration under oath in the Land Office, which should state:

"That he intends to reclaim a tract of desert land not exceeding one section by conducting water upon the same within the period of three years thereafter. * * * At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding 640 acres to any one person, a patent for the same shall be issued to him; provided, however, that no person shall be permitted to enter more than one tract of land and not to exceed 640 acres, which shall be in compact form."

On March 3d, 1891, Congress amended the Desert Land Act by adding thereto five new sections, leaving the language of the old law unchanged. (26 Stat. 1095.) Section 5 of this amendment is as follows:

"Sec. 5. That no land shall be patented to any person under this act *unless he or his assignors shall have expended* in the necessary irrigation, reclamation and cultivation thereof by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least $3 per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than $1 per acre for the purpose aforesaid; and he shall in

like manner expend the sum of $1 per acre during the second and also during the third year thereafter, until the full sum of $3 per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of $1 per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the land shall revert to the United States, and the 25 cents advance payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier day than hereinbefore prescribed, provided that he then make the required proof of reclamation to the aggregate extent of $3 per acre; *provided*, that proof be further required of the cultivation of one-eighth of the land."

Section 6 of the amendment, after providing the method for perfecting entries theretofore made, says:

"All acts and parts of acts in conflict with this act are hereby repealed."

And section 7 of the amendment contains the following language:

"That at any time after filing the declaration and within the period of four years thereafter, upon making satisfactory proof

> to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant *or his assigns*, but no person or association of persons shall hold, by *assignment* or otherwise prior to the issue of patent, more than *320* acres of such arid or desert land."

(The full text of both the original Desert Land Act of March 3d, 1877, and the amendment to such Act of March 3d, 1891, is printed in the appendix to this brief for the convenient reference of the court.)

On March 26, 1908 (35 Stats. 48), Congress passed an act providing for second desert land entries. After stating the instances wherein a second entry may be made, the language of the act is as follows:

> "Provided that the provisions of this act shall not apply to any person whose former entry was *assigned* in whole or in part, or cancelled for fraud, or who relinquished the former entry for a valuable consideration."

On March 28, 1908 (35 Stats. 52), Congress passed an act entitled "An Act limiting and restricting the right of entry and of *assignment* under the Desert Land Law, and authorizing an

extension of time within which to make final proof."

Section 2 of this act is as follows:

> "That from and after the passage of this act, no *assignment of an entry* made under said acts shall be allowed or recognized except it be to an individual who is shown to be *qualified to make entry* under said acts of the land covered by the *assigned* entry, and such *assignments* may include all or part of an entry, but no *assignment* to or for the benefit of any corporation or association shall be authorized or recognized."

The purpose of this land act was twofold: first, to require of assignees the same qualifications as of original entryman, and second, to limit an assignee's right just as an entryman's rights were limited, to a single entry.

The former statute required an entryman to be a resident of the state in which the entered land was located, but there was no such restriction upon the qualifications of an assignee, and the Land Department had held that an assignee need not be a resident of the state in which the entered land was situated.

In re Kimball, 20 L. D. 67.

This new act of March 28, 1908, ended this distinction between the qualifications of the entryman and the assignee. The existing statute only allowed a single "entry" to be made, but placed no limit upon the number of assignments

one might hold or might have held, except that it provided that no one "shall hold, by assignment or otherwise, prior to patent, more than 320 acres of such arid or desert lands." And it was the practice of parties to buy and sell desert land assignments prior to this requirement *ad infinitum*, provided they did not hold at any *one time* more than 320 acres of such desert land prior to patent.

This practice, and this distinction between the right to hold by original entry and by assignment, the new statute ended.

It is apparent that this new statute of March 28, 1908, not only recognized the right of assignment under the existing law, but recognized that the rights of an assignee were much greater than those of an original entryman, and the purpose of the act was to limit both the qualifications and the rights of an assignee so that they would not exceed those of an original entryman.

Since the decisions of the lower court in this case and in the Chaplin case, above referred to (holding that a desert land entryman must intend to personally reclaim, and must actually reclaim personally, the entered land, and that he could not intend to assign or actually assign his entry until after the completion of reclamation), Congress has passed a remedial statute applicable to Imperial county in California alone, but not applying elsewhere. This act was passed June 25, 1910, and appears at page 867, Part I, Proceed-

ings of the Second Session of the Sixty-first Congress, and is entitled, "An Act for the relief of *assignees*, in good faith, of entries of desert land in Imperial county." Section 1 thereof contains the following language:

> "That any person, other than a corporation, who has in good faith heretofore *acquired by assignment* a desert land entry, which entry is regular upon its face, in the belief that he was obtaining a valid title thereto, which *assignment* was accepted when filed at the Local Land Office of the United States and recognized at the General Land Office as a proper transfer of said entry, shall be entitled to complete the entry notwithstanding any contest that has been or may be filed against such entry based upon a charge of fraud of which the *assignee* had no knowledge."

Section 2 of the act provides:

> "That when a person having made entry under the Desert Land Law was thereafter permitted by the Land Department to hold another entry or entries *by assignment*, or where a person having previously perfected title under an *assignment* of a desert land entry, or having held land under *assignment* to the amount of 320 acres or more, at different times, was thereafter permitted by the Land Department to make an entry in his own right, or to hold other lands under *assignment*, such persons, or their lawful *assignees*, shall be, upon showing full compliance with all requirements of existing law as to expenditure, reclamation and cultivation, permitted to complete title to the land

> now held by them, notwithstanding any contest that may have been or may hereafter be filed against the entry, based upon the charge that the present claimant has exhausted his rights under the Desert Land Law by reason of having previously made an entry, or held land, under *an assignment*, as above detailed. * * * Provided, further, that no person shall be entitled to the benefit of either the first or second section of this act who has heretofore acquired title to 320 acres of land under the desert land laws."

Why this remedial act, intended to give relief from the chaos in desert land titles resulting from the decision of the lower court in this case, should have been confined in its scope to the Imperial Valley in California, we are at a loss to imagine, except upon the theory that the Land Department was instrumental in securing the passage of the bill, and it did not anticipate that the decision in question would be followed in other jurisdictions so as to seriously interfere with the Land Department's established practice of permitting desert land assignments elsewhere; and we understand that even in California the action of the Land Department in permitting assignments of desert land entries and proof by assignees and the issuance of patents to assignees, has been in no wise affected by the lower court's decision in this case, such decision having been entirely disregarded by the Land Department in its administering the desert land law.

It seems to us that there could not be a clearer congressional interpretation of the desert land law, as permitting assignments, than is contained in these three latter acts. We ask the court to compare the liberal language contained in the desert land statutes, their lack of restraint upon alienation, their express recognition of the right of assignment, and their entire absence of any prohibition of speculative intent, with the very stringent language upon such subjects in the following public land laws, under which prosecutions for perjury and for conspiracy to defraud the United States have been had.

(2) The Language of the Pre-emption Law

The court's attention is called, first, to the language of the old statute giving the pre-emption right (see Sec. 2262 Rev. Stat.), which provides that the entryman must at the time of filing his declaratory statement make oath that he has not entered

> "Said land to sell the same on speculation, but in good faith to appropriate the same to his own exclusive use; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself."

(3) The Language of the Homestead Law.

Later, substantially the same language was embodied in the homestead law. See Sec. 2290 Rev. Stats. U. S., in which appears the following:

> "That any person applying to enter any lands under the preceding section, shall first make and subscribe before the proper officer, and file in the proper Land Office, an affidavit that he or she is the head of a family, is over 21 years of age, that such application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all requirements of law, as to settlement, residence and cultivation necessary to acquire title to the land applied for; *that he or she is not acting as the agent of any person, corporation or syndicate making such entry, nor in collusion with any person, corporation or syndicate, to give them the benefit of the land entered or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made and will not make any agreement or contract in any way or manner with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except himself or herself.*"

The court will notice that the stringent and restrictive portions of the last section prohibiting a speculative intent and prohibiting alienation and agreements to alienate, is that portion which we have printed in italics, and we call the court's attention to the fact that this italicized portion of the section did not exist prior to 1891; but that such portion of the section was added by section 5 of the act of Congress of March 3d, 1891,—section 2 of which act amended the Desert Land Act by expressly recognizing the right to assign desert land entries.

It will thus be seen that when Congress amended the Desert Land Act in 1891 it had clearly in mind the fact that it was *by the same act making more stringent and prohibitive the provisions of the homestead law on the subject of speculative intent, and the right of alienation;* and that Congress was fully aware of the fact that the right to have a speculative intent would exist, and the right of alienation would exist, unless restrained or prohibited by express language of the statute; hence, where it wished to create such restraint, it used express and explicit language to do so; and had Congress intended that such restraint should apply to the intention to alienate, or to the right to alienate a desert land entry, it would have so provided in some plain and unmistakable language in the desert land amendment, *which was a part of the very*

act amending and making more restrictive and prohibitive the provisions of the homestead law on the subject of speculative intent and the right of alienation.

(4) The Language of the Timber and Stone Law.

Very similar language was used by Congress in defining the requirements under the Timber and Stone Act. See Sec. 2 of the act of June 3d, 1878, 20th Stat. 89, which requires the entryman to file with the register of the proper land district a written verified statement, which, among other things, must contain the following statement:

> "That deponent has made no other application under this act, *that he does not apply to purchase the same for speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he might acquire from the government of the United States, would inure in whole or in part to the benefit of any person except himself;* which statement must be verified by the oath of the applicant before the register or receiver of the Land Office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said land and all rights and title to the same."

(5) The Language of the Timber Culture Law.

The court's attention is next called to very similar language contained in the Timber Culture Act. See Sec. 2 of the act of June 14, 1878 (20 Stat. 113), which requires that a person applying for the benefits of such act must make oath before the register and receiver to the following, among other things:

> "That this filing and entry is made for the cultivation of timber and *for my own exclusive use and benefit;* that I have made the said application in good faith and *not for the purpose of speculation or directly or indirectly for the use or benefit of any other person or persons whatsoever.*"

(6) Conclusions Based Upon the Difference in the Language of the Foregoing General Land Acts.

The above constitute the four leading and the principal general land acts, outside of the desert land law, under which the major portion of the non-mineral public domain of the United States has been disposed of for more than a quarter of a century. The language of each is clear and unmistakable, and prohibits an entry if any agreement to assign has been made before entry, or if the entry is made for the use or benefit of anyone other than the entryman, or if the same is made for speculative purposes; and the homestead and

pre-emption laws have been construed as prohibiting assignments made before either original entry or final entry, as the pre-emption law contains a clause which provides:

> "That all assignments and transfers of the right hereby secured prior to the issuing of patent shall be null and void."

And the homestead law provides not only that the entryman shall at the time of making his original entry swear that he *has not made* any agreement to sell, but that he *"will not make"* any such agreement. The Timber and Stone Act and the timber culture law have been construed by the United States Supreme Court, and by other courts, as prohibiting assignments prior to *original entry* only, but not as prohibiting assignments made after original entry and before final entry, although no right of assignment is expressly given in either of such acts.

See

Adams v. Church, 192 U. S. 510;
Williamson v. U. S. 207, U. S. 427;
U. S. v. Biggs, 211 U. S. 507.

We will discuss these cases later.

The foregoing examination of the provisions of the Desert Land Act shows the marked difference between it and the Pre-emption law, the Homestead law, the Timber and Stone Act, and the Timber Culture Act, in that the Desert Land

Act not only does *not* contain any such provisions as to the entry not being made for speculative purposes, and being for the sole use and benefit of the entryman, and not in the interest of or for the benefit of anyone else; but, on the contrary, the Desert Land Act, as amended in 1891, specially permits the barter and sale of the rights of the entryman, by permitting assignments thereof without limitation, either as to the time thereof or the price obtained therefor, so long as the assignee is qualified to take, as required by statute.

Prior to the Chaplin case no case of criminal conspiracy to defraud the United States of desert lands under the Desert Land Act had ever arisen; and probably for the very reason that the statute not only has no provision excluding a speculative purpose, or prohibiting agreements to assign before entry, but does expressly authorize alienation of entries, without any restriction as to the *time* when such alienation may be made, or contracted for. The courts in holding unlawful, agreements to assign in advance of entry under the Pre-emption, Homestead, Timber Culture and Timber and Stone Acts, have placed their ruling *upon the express language of the statute prohibiting such agreements*, and not upon the ground that such assignments would be against public policy.

The reason for the difference between the Desert Land Act, and the Pre-emption law, the Homestead law, the Stone and Timber Act, and

the Timber Culture Act, as regards assignment, is, as we have already shown, fundamental, and based on the character of the land offered and the purposes of the act. Under the Desert Land Act the thing offered is worthless in its offered state, and value can only be infused therein by the entryman's efforts and money, and hence, owing to its inherent unattractiveness, the government is offering liberal terms and conditions to promote its reclamation, while under such other acts the property offered is presumed to be valuable *per se* in its offered state, and no special inducements were required to secure entries, but special precautions were required to prevent entrymen being used as tools of speculators who desired to monopolize large amounts of such land.

The primary purpose of the Desert Land Act was, and is, the speedy and permanent reclamation of the arid lands of the United States through irrigation; when this is accomplished and no one gets more land than authorized by the statute, and the government receives the full purchase price, the law is satisfied, whether the land goes to the original entryman or to his successor in interest.

(B) Reasons for the Changes in the Desert Land Act by the Amendment of 1891.

In the practical application of the original desert land law, certain objections were found to such act. First, the area allowed by a single entry was considered as a matter of public policy excessive; and second, that it permitted the land to be tied up and excluded from other entry for three years without any showing as to the effort being made to reclaim it, and thus accomplish the purpose of the act, viz.: the speedy reclamation of the land; third, as the right of assignment was not expressly given, and the Land Office decisions were conflicting as to whether or not the right of assignment existed, a serious restriction or embargo was placed upon dealing with the title during the time that the financing of the irrigation project necessary to reclaim the land was in progress. Hence, the amendment of 1891, which limited the area of a single entry to 320 acres, gave the right of assignment, allowed four years to complete the reclamation, and required the expenditure of one dollar per acre each year for the three years in the reclamation and improvement of the land.

We maintain that under the act as amended, so long as both entryman and assignee can qualify, as required by the statute, it is wholly immaterial to the government whether the entryman makes his entry with the intention of selling or

assigning to some qualified person who will reclaim, or with the intention of personally reclaiming, himself. It is the actual reclamation which is sought, regardless of the intentions of the entryman, or as to whether the reclamation is accomplished by the entryman or his assignee.

The government secures twenty-five cents per acre at the time the original filing is made, and someone thereby becomes interested to that amount in the reclamation of the land, and his investment is thrown away unless he or his assigns shall go on and expend $1.00 per acre per annum for three years, in reclamation and improving the land, and unless he or his assigns shall have acquired a permanent water supply for the land, brought the same to the land, and placed the land under irrigation, and at least one-eighth thereof in cultivation within four years; and when this is done, patent will issue to "*the applicant or his assigns*" for not to exceed 320 acres thereof to one person. We submit that it is wholly immaterial to the government whether the original entryman shall have made his entry with the intention of assigning same, or of personally reclaiming same; as neither the original applicant, nor his assigns, can acquire title without reclaiming the land, as required by law, and without making the annual showing of expenditure required by the act; and it is wholly immaterial to the government how frequently such entry shall have

been bartered and sold between the date of the filing and the date of final patent, or how much money or profit may have been made by the various assignees thereof, or by agents or third persons who have brought about such assignments. The more the property has increased in value, and the more the profit to such parties, the less the probability of the land reverting to the government in an unredeemed condition, and the greater the probability of successful reclamation of the land,—which is the thing of primary interest to the government.

Men who have not sufficient faith in an irrigation enterprise, or sufficient courage and fortitude to undertake and carry out *themselves* the hazardous task of reclaiming the desert, or sufficient money to acquire the water rights and improve the land, may, notwithstanding such facts, make entry of desert lands, relying upon their right under the Desert Land Act to transfer the same to some DULY QUALIFIED ASSIGNEE, for a satisfactory price; as no one is injured thereby, and the provisions of no law violated. The government certainly would suffer no injury by such a proceeding; on the contrary, it would receive a positive benefit, and the purpose of the Desert Land Act, viz.: the reclamation of the desert, would be materially promoted thereby.

(C) Authorities Construing the Desert Land Act and Other Acts for the Disposal of the Public Domain as to the Assignability of Entries.

The decisions of this court and of the Supreme Court of California, as well as of other courts, are numerous to the effect that where a property right, such as the right to enter public lands, is conferred by statute, the right to transfer and assign such right exists, unless expressly prohibited by law or opposed to public policy; and it follows that where such right of assignment exists, the right to make entry with the intent of availing one's self of the right of assignment also exists, and no alleged conspiracy to induce a party to exercise a lawful right can be criminal.

(D) The Law is Well Settled that Every Interest Acquired in Public Land is Assignable and Transferable Unless Prohibited by Statute; and no Words Allowing Assignment are Necessary.

See the following cases so holding:

Simms v. Guthrie *et al.*, 9 Crench. 19, 3 L. Ed. 642;

Threadgill v. Pintard, 12 Howard 24, 13 L. Ed. 877;

French v. Spencer, 21 Howard 228, 16 L. Ed. 97;

Maxwell v. Moore, 22 Howard 185, 16 L. Ed. 251;

Myers v. Croft, 13 Wallace 291, 20 L. Ed. 562;
Hussey v. Smith, 9 Otto 20, 25 L. Ed. 315;
St. Louis S. & R. Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875, p. 880;
Telferner v. Russ, 145 U. S. 522, 36 L. Ed. 800, p. 805;
Beley v. Napthally, 169 U. S. 353, 42 L. Ed. 755, 779;
St. Louis M. & N. Co. v. Montana M. Co., 171 U. S. 651, 43 L. Ed. 320;
Rose v. Nevada Wood & Lumber Co., 73 Cal. 385;
Montgomery v. Pac., 94 Cal. 284;
Phillips v. Carter, 135 Cal. 604;
Arnold v. Christie, 33 Pac. 619;
Knight v. Leary, 54 Wis. 459;
McElyea v. Hayter, 2 Porter 148, 27 Am. Dec. 645.

The following recent cases adhere to the principle announced in the foregoing decisions:

Adams v. Church, 192 U. S. 510, 48 L. Ed. 769;
Webster v. Luther, 163 U. S. 331, 41 L. Ed. 179;
Williamson v. U. S., 207 U. S. 425;
U. S. v. Biggs, 211 U. S. 507.

(1) Cases Construing the Soldiers' Bounty Acts, Pre-emption Laws and Mining Laws.

The fact that the courts have recognized the right of alienation of an interest in or right to public lands, unless such right is restrained and prohibited by act of Congress, is clearly decided in the first two cases above cited. These cases are peculiarly in point. The court there was called upon to construe the soldiers' bounty acts. In 1811 and 1812 Congress had passed laws granting bounties, and subsequently, by the act of 1812, placed a restraint upon the right of alienation. In 1816 and 1826 bounty acts were passed in which there was no restriction upon alienation; and these cases hold that where the right of alienation was not expressly restricted, the party entitled to the right could transfer.

In French v. Spencer, *supra*, the court uses the following language in speaking of the restraint on the right to alienate the right acquired under the acts of 1811 and 1812 and 1816:

> "Congress may have thought it not at all necessary to guard the Canadian volunteers against being overreached by speculators and deprived of their bounty lands. This, however, is mere conjecture."

Then the court says:

> "The act of March 5, 1816, has no reference to, or necessary connection with, any

other bounty land act; it is plain on its face, and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on the part of the judicial tribunals legislative power. It is, that *where the legislature makes a plain provision, without making any exception, the courts can make none.* (McIver v. Regan, 2 Wheat. 25; Patton v. McClure, Martin & Yerger's Tenn. 345, and cases cited; Cocke & Jack v. McGinnis, *ib.* 365; Troupe v. Smith, 20 John 33.) *We are therefore of the opinion that Fosgit could sell and convey the land to Spencer after the entry was made.*"

The second case construes a similar act passed in 1826, and follows French v. Spencer.

In Myers v. Croft, *supra*, the construction of the last clause of section 12 of the Pre-emption Act of 1841 is passed upon. The court says:

"The inquiry is: What did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the rights conferred by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be, when the time limited for perfecting the pre-emption expired. *This right was valuable, and independently of the*

legislation of Congress, assignable. (Our italics.) Threadgill v. Pintard, 12 How. 24. The object of Congress was attained when the pre-emptor went, with clean hands, to the Land Office and proved up his right, and paid the government for his land. *Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy.* It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given; and equally well known that nearly all the valuable lands in the new states admitted since 1841 have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the government should choose to issue the patent."

In St. Louis etc. v. Kemp, *supra*, Justice Field, in passing upon the assignability of a mining claim, uses the following language:

> "A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. EVERY INTEREST IN LANDS IS THE SUBJECT OF SALE AND TRANSFER, UNLESS PROHIBITED BY STATUTE, AND NO WORDS ALLOWING IT ARE NECESSARY. In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim. Section 13 of the

act of 1870 declares that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the statute of limitations of the state or territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Section 5 of the act of 1872, rendering a mining claim subject to relocation where certain conditions of improvement or expenditure have not been made, has a proviso that the original locators, 'their heirs, *assigns* or legal representatives have not resumed work upon the claim after such failure and before such location.' These provisions are, of themselves, conclusive that the locator's interest in a mining grant is salable and transferable, even were there any doubt on the subject, in the absence of express statutory prohibition. Those of the act of 1870 are also conclusive of the right of the purchaser of claims to a patent, for it is with reference to that the derivative right by purchase or assignment is mentioned. R. S. Secs. 2332, 2324."

In view of the first phrase in section 5 of the Desert Land Act, to-wit: "That no land shall be patented to any person under this act unless he *or his assignors* shall have expended," etc., the language of Justice Field above quoted is particularly pertinent to show a proper interpretation thereof.

In Beley v. Napthally, 169 U. S. 353, 42 L. Ed. 755-799, it was contended by counsel that a Mexican grantee of land under the act of Congress in

1866, who had the right to purchase land under that act, could not assign such right of purchase, but that the privilege of purchase was a purely personal one. This court held otherwise after reviewing the decisions, among them Webster v. Luther, and says:

> "In the above cases the general rule of law which disparages all restraints upon alienation was recognized, and the assignments of a right before entry was held valid. One of the reasons for such holding being that there was no restriction against such assignment contained in the act creating the right, nor is any such restriction to be found in the act of 1866."

In Hussey v. Smith, 9 Otto 20, 25 L. Ed. 315, this court held that an occupant of a city lot entered by the mayor under the act of March 2nd, 1869, in trust for the citizens, has a right to sell and convey such lot although not authorized so to do by this statute. The act being silent upon the subject, and no such sale being prohibited by the statute, an assignment was held legal.

(2) Phillips v. Carter, 135 Cal. 604, Holding Desert Land Entries Assignable Even Under the Original Act Which Did Not Expressly Allow Assignments.

We call the court's attention to the leading case construing the Desert Land Act, as to the right of assignment, which is Phillips v. Carter, 135

Cal. 604, where it is held that even under the original Desert Land Act of 1877, which did not expressly give the right of assignment, that such right nevertheless existed, as it was not *expressly prohibited* by law, and was not opposed to public policy. The court says:

> "There is nothing in the Desert Land Act of 1877, nor in the act of March 3, 1891, amendatory thereto, which either in terms or by express implication prohibits assignments; and while it is true that in construing the acts of the government and of the grant depending thereon, the rule of construction is that most favorable to the grantor, yet the highest tribunal of the country and the court of last resort for the construction of such acts, has uniformly held that this rule does not impose such a limitation upon ownership, unless by express provision or by necessary implication the law must be so read. Thus, in Webster v. Luther, 163 U. S. 331, the court, discussing the law affecting the sale and transfer of soldiers' additional homestead rights before entry, says:
>
> " 'The presumption is that Congress intended to make this right as valuable as possible. Any restrictions upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the ex-

isting homestead law, leaves us without doubt that the assignment before entry of the right to this additional land granted by U. S. Revised Statutes (Sec. 2306) contravenes no public policy of the nation, violates no statutes and is valid.'

"Without multiplying authorities upon this proposition it is sufficient to refer to the language of this court in Rose v. Nevada etc. Lumber Company, 73 Cal. 385, where it is said: 'In the absence of an express prohibition against alienation of the property by the complainant after the issuance of a certificate from the General Land Office to locate in person or by agent a certain number of acres, we cannot deny that the right so to alienate does not exist. *It is a right which need not in terms be granted by the sovereign authority, for it exists, if not expressly prohibited or opposed to public policy.*' (Italics the court's.)"

The court then continuing:

"The right of alienation or assignment, therefore, in absence of imposed restrictions, vests in the entryman, and, as has been said, there is nothing in the law imposing such restrictions, while, upon the other hand, equitable considerations impel strongly to the view that such rights should be assignable. * * * The central idea, and the whole policy of the government in dealing with these arid lands, was to secure their reclamation upon moderate terms for the benefit of the country. While, of course, having no determinative weight in the matter, the views of the Land Department are entitled to consideration. The receipts which they originally issued under the act of 1877 tacitly as-

> sumed that the rights of the entryman were alienable, and provided in terms that a patent should issue to the entryman 'or to his assigns or legal representatives.' Later, however, the department apparently began to doubt the soundness of its construction of the act, and announced that while it would not recognize future assignments, it would recognize entries which had been assigned prior to the promulgation of the last decision, and that patents therefor would be issued to assignees. Later again, it fully recognized the assignability of such entries. Finally it may be said that the fancied evils which appellant sees in the construction that such entries are assignable, and that it was to avoid these evils that Congress did not in the act of 1877 expressly make them assignable, are disposed of, by the fact that Congress in the amendatory act of 1891, instead of expressly declaring them to be *un*assignable, expressly declares them to be *assignable*."

In the case here before the court we of course are dealing with the law as amended, and after the right of assignment was expressly conferred and recognized by the statute itself.

(3) The Williamson Case, 207 U. S. 425, Holding That Entries Under the Timber and Stone Act Are Assignable After Original Entry, and Before Final Entry, and Holding Argumentatively That Agreements to Assign Prior to Original Entry Are Unlawful Only Because Expressly Prohibited by the Statute.

Upon this subject we call the court's special attention to the recent case of Williamson v. U. S., 207 U. S. 425-458, decided January 6th, 1909. In that case this court had under examination an alleged criminal conspiracy to suborn perjury under the Timber and Stone Act; the contention of the government in that suit was that as the second clause of the Timber and Stone Act required the entryman at the time of his *original* entry to make oath that his entry was for his own use and benefit and not for the use and benefit of anyone else, and was not for speculative purposes, and that he had made no agreement by which the title that he might acquire from the government would inure to the benefit of anyone else than himself, it followed that a similar oath exacted by the Land Department, to be made at the time of *final* entry, some sixty days later, was within the *policy* of the law, and was therefore a lawful requirement, and that the statute should be construed as requiring

the same oath upon final entry as upon original entry. In that case the evidence showed that the defendants had conspired to induce certain designated parties to make such final entries and to take such oaths upon final entry, which oaths were shown to be false, in that before making such final entries, and after making the original entries, the entryman had assigned their rights thereto, hence it was claimed a criminal conspiracy to suborn perjury under section 5440 of the Revised Statutes was shown.

This court, however, rejected each of such contentions of the prosecution, and held distinctly that as the statute did not exact upon *final* entry any such oath concerning the absence of a speculative intent, or as to non-assignment, as was exacted upon the original entry, it followed that Congress did not intend any such requirement, and that the Land Department had no power to exact such a requirement, and *that an assignment of a timber and stone entry after original entry and before final entry was not prohibited, but* WAS LAWFUL, and therefore no criminal conspiracy could be based upon such an assignment, or upon the falsity of the oath made upon final entry, in so far as it alleged non-assignment of the entry. The court held further that neither the oath taken upon final entry as to non-assignment, nor the assignment intermediate the original and the final entry, could be introduced in evidence to show the

motive of the entryman at the time of the original entry. The case is especially strong when it is borne in mind that the act there being construed was one in which the policy of the law as shown by previous language of the statute was adverse to speculative entries and adverse to the assignments of entries, and was a statute in which the right of assignment was nowhere expressly authorized. How much more liberal, therefore, should the court be in a case like the present, where not only the spirit and policy of the law and the purpose to be accomplished thereby requires great liberality in allowing the barter and sale of entries to anyone who will reclaim the land, but where assignments are *expressly allowed* by the language of the statute itself, and by the uniform practice of the Land Department in administering the statute.

This court in the Williamson case, after showing that section 2 of the Timber and Stone Act contains stringent provisions as to absence of speculative intent and non-alienation at the time of *original* entry, takes up and examines the third section of such act, relating to *final* entries and final proofs, and in that connection says:

> "Examining the items which the statute requires the applicant to make proof of, after showing publication, it is apparent while some of the things referred to in the prior section and which are required to be stated in the preliminary proofs are reiterated, *all*

> *requirement is omitted of any statement regarding a speculative purpose on the part of the applicant, his bona fides and his intention to acquire for himself alone.* When the context of the statute is thus brought into view, we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration at the *final* hearing of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which, by the very terms of the statute, is manifest was intended to be excluded therefrom."

The court then proceeds to show the liberal construction which this court had placed upon the right of assignment in timber culture cases (citing and quoting from Adams v. Church, 192 U. S. 510, 48 L. Ed. 769), as well as under the preemption law (citing Myers v. Crofts, 13 Wallace 291, 20 L. Ed. 562).

After thus showing that it had been the uniform practice of the court to permit assignments of land entries, unless such are expressly prohibited by the statute or opposed to the policy of the law, the court takes up the validity of the Land Office regulations exacting upon final entry in timber and stone cases the oath as to non-alienation of the land, and upon that subject says:

> "It remains only to consider whether it was within the general power of the Commissioner of the General Land Office to enact

rules and regulations by which an entryman would be compelled to do that, at the final hearing, which the act of Congress must be considered as having expressly excluded, in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in Adams v. Church (p. 517), 'To sustain the contention would be to incorporate a prohibition against the alienation of an interest in the land, not found in the statute or required by the policy of the law upon the subject.' True it is that in the concluding portion of section 3 of the Timber and Stone Act it is provided that 'Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office,' but this power must, in the nature of things, be construed as authorizing the Commissioner to adopt rules and regulations for the *enforcement* of the statute, and cannot be held to have authorized him by such an exercise of power to virtually adopt rules and regulations *destructive of rights which Congress has conferred.* As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements *was under no obligation to make such an affidavit, and had full power to dispose ad interim of his claim* upon the final issue of patent, we think the motive of the applicant at the time of final proof was irrelevant, even under the particularly broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procure-

ment of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the land. Reversed and remanded."

In Adams v. Church, 192 U. S. 510, 48 L. Ed. 769, this court held that although the Timber Culture Act requires an applicant in his *original* entry to swear to the absence of speculative purpose, and to swear that the entry was for his own use and benefit, and that he had made no agreement, directly or indirectly, to assign the same, that such law did not require any such showing upon *final* entry; and therefore an agreement made after original entry and before final entry, to assign the entry after patent, was not prohibited, but was lawful, and the court held in that case, just as it did in the Williamson case, that the regulations of the Land Office exacting the same oath upon final entry as upon original entry, was unlawful, and that the entryman was under no obligation to take such oath, and therefore such oath was immaterial and irrelevant to the controversy, and its falsity was of no consequence.

The court's attention is again called to the case heretofore referred to of Myers v. Crofts, 13 Wallace 291, 20 L. Ed. 562, which holds that although section 12 of the Pre-emption Act of September 4, 1841 (5 Stat. 453), provided that "All assign-

ments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void," yet notwithstanding such provision, the statute does not prevent the pre-emptor from *selling the land itself* after final entry and before patent, although he could not sell his pre-emption right, as such. This is one of the most extreme cases showing the antipathy of the courts to statutes in restraint of alienation of property.

(4) Webster v. Luther, 163 U. S. 331, Establishing the Right to Assign Soldiers' Additional Homesteads Even Before Original Entry. It is the Leading Case as to the Assignability of Entries Where the Statute Itself Does Not Prohibit Agreements to Assign Before Original Entry.

We now call the court's attention to the leading case of Webster v. Luther, 163 U. S. 331, 44 L. Ed. 179, being the case referred to by the Supreme Court of California in the decision from which we have already quoted. In this case of Webster v. Luther this court set at rest the question, which had until that time been an open one, as to whether or not the right to make a soldier's additional homestead entry was assignable, and if so, as to whether or not it was assignable before original entry; and the court distinctly held that such right of entry was assignable and transferable,

91

and that an assignment thereof before the original entry was made, wherein the assignee was given power to make the entry, and to keep, sell or dispose thereof as he saw fit, and to retain all the proceeds thereof, was lawful and not prohibited by the statute.

The soldiers' additional homestead law is found in section 2306 of the Revised Statutes, which reads as follows:

> "Every person entitled under the provisions of section 2304 to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres."

It is perfectly clear from this language that no one is *expressly* permitted to make such additional homestead entry except a person who was entitled to make, and who had made, an original homestead entry which embraced less than 160 acres; yet so strongly do the courts disfavor a construction of a statute which would be in restraint of alienation that the court distinctly held that as there was nothing in the policy of the law to prevent the assignment of such right to make entry, even before the original entry was made, that such assignments would be permitted. If, when dealing with a statute which does not expressly authorize assignments, and which seems to permit entries to be made *only by certain speci-*

fied persons, the courts will hold that the right to make such entry is assignable, *even before the entry is made*, it certainly would follow, when dealing with a law like the Desert Land Act, which expressly permits assignments, that the lawful right to make such assignments would be upheld, even though agreements to make such assignments were entered into prior to the entry itself being made.

(5) United States v. Biggs. Decision by District Judge Lewis of Denver is in Full Accord With the Williamson Case, and the Strongest Case We Have Found Supporting Our Views Here.

Probably the most directly in point of any of the cases applicable to the present controversy is the case of United States v. Biggs, 157 Fed. 264, decided December 24th, 1908, by U. S. District Judge Lewis of Denver—upon the strength of which a large number of indictments for conspiracy to defraud the United States under the Timber and Stone Act against citizens of Colorado were quashed.

The decision has since been affirmed by this court.

Judge Lewis held in this Biggs case that a contract by an applicant for entry of public land under the Timber and Stone Act, made after the application, but before the consummation of the

entry, by which the money to pay for the land was to be furnished by another, and the title when acquired was to be conveyed to such other, was not unlawful under the statute, and that the procuring of such a contract was not criminal and could not be made the basis of an indictment to defraud the United States of such lands under Revised Statutes, Section 5440. In the course of the opinion the court says:

> "The acts charged against the defendants are not prohibited in the Timber and Stone Act, and we cannot by construction read into that act a prohibition against them, and in such manner, by construction, hold the acts charged to be in violation of said statutes, and therefore illegal or unlawful, for the purpose of constituting the fraud denounced by section 5440."

After an exhaustive review of the decisions concerning the right of assignment of land entries, where such assignment is not prohibited by the statute, and after a full analysis of the leading cases upon the construction of criminal statutes, the court reaches the following conclusions, namely:

> "From the foregoing I conclude, first, that the agreements between the entryman and defendants, as charged in the indictment, were neither void or voidable, but were enforcible contracts between the parties; second, that the acts charged are neither prohibited by statute and unlawful, not *mala in se*, nor do they involve moral turpitude;

> hence, whether we consider them as means to accomplish an end, or as the end to be accomplished, they do not constitute a crime. The indictment, therefore, does not charge an offense."

With even greater force can it be said here that the acts charged against the defendants in the Chaplin case, or against those whom they were to induce to make desert land declarations, are not prohibited by the Desert Land Act, and that the court cannot by construction read into the statute a prohibition against them, and in such manner by construction hold the acts charged to be in violation of such statute, and therefore illegal or unlawful for the purpose of constituting fraud denounced by section 5440 of the Revised Statutes.

(6) *The Case of U. S. v. Biggs, 211 U. S. 507, in Which the United States Supreme Court Holds That It Cannot Be Unlawful to Conspire to Have Done That Which the Statute Does Not Prohibit, But Impliedly Recognizes as Lawful.*

After the Chaplin case was first argued and decided by the lower court below this court affirmed the decision of Judge Lewis in the Biggs case (see U. S. v. Biggs, 211 U. S. 507, 58 L. Ed. 305), and after fully stating the case and quoting

extensively from the opinion of Judge Lewis, the Supreme Court says:

> "Coming to consider the construction given by the court to the Timber and Stone Act, as applied to the allegations of the indictment, as interpreted by the court, *the correctness of the construction given by the court below to the statute is established beyond controversy by the decision in Williamson v. U. S., 207 U. S. 425, announced since the decision below was rendered.*"

The court then proceeds to review the Williamson case and to state what it decided and applies its reasoning to the Biggs case in the following language, which, we submit, is directly applicable to and is conclusive against the government's contention and the lower court's decision in the Chaplin case, viz.:

> "It is insisted by the government that however conclusive may be this ruling as to the power of the applicant to sell after application, and to perfect his entry for the purpose of enabling him to perform such contract, that such ruling does not preclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase subsequently to agree to convey his interest in the land, would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the Williamson case was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another,

and to perfect his entry for the purpose of transferring the title after patent. This being concluded by the decision in the Williamson case, the distinction now sought to be made comes to this—*that it is unlawful under the statute to conspire to have done that which the statute did not prohibit, and on the contrary, by implication, recognized could be lawfully done without prejudice or injury to the United States in any manner whatever.* This also serves to demonstrate that no error was committed by the court below in holding that under section 5440 Rev. Stats. the acts charged in the indictment could not possibly have constituted a defrauding of the United States in any manner or for any purpose within the meaning of that statute."

(7) The Lower Court's Interpretation of the Biggs Case.

In our judgment this entire controversy involved in the Chaplin case and in this case is concluded in the defendants' favor in the Chaplin case and in the government's favor in this case by the decision of the District Court and of this court in this Biggs case. Let us examine for a moment, however, the line of reasoning by which the lower court in the Chaplin case, in its decision upon the last argument of the demurrer, escapes the reasoning of the Biggs case, and uses such case as an authority sustaining its decision.

Judge Wellborn, in his last opinion upon the demurrer, finds language, both in the opinion of

Judge Lewis and in the opinion of this court in the Biggs case, which, in his judgment, distinguishes such case from the Chaplin case, and destroys such case as an authority for the defendants Chaplin; and his argument is that in the Biggs case the court was dealing with an entryman's "*application in good faith for his own exclusive use and benefit,*" and not with an application "*in reality for or on behalf of another.*" [See Tr. p. 111, Chaplin case.]

In summing up his review of the Biggs case Judge Wellborn says:

> "It is unnecessary to multiply extracts from such opinions. A careful reading of them will confirm what I have already indicated, that both the Supreme Court and the trial court industriously qualify their decision so that they could be applied only to a case where the '*entryman made application in good faith for his own exclusive use and benefit,*' that is, to a lawful entry, thus excluding entries fraudulently initiated." [Tr. pp. 112-113, Chaplin case.]

Undoubtedly so, but the statute there being construed expressly provided that in his initial application the entryman should swear "that he does not apply to purchase the same upon speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract in any way or manner with any person or

persons whatsoever, by which the title which he might acquire from the government of the United States would inure, in whole or in part, to the benefit of any person except himself," and it is not claimed that such statute has ever been amended in any wise dispensing, either directly or indirectly, with this stringent oath. No such oath is required by the Desert Land Act, however. There is no proviso that the desert entry shall not be made for speculation, or must be made for the sole use or benefit of the entryman, or that the entryman has not made any agreement by which the title shall inure to the benefit of anyone else.

The only language in the Desert Land Act which it is claimed is prohibitive of a speculative intent is the language in the old act, "he intends to reclaim," etc., which we think we have abundantly shown cannot be construed as prohibiting an entry made with the intention of assignment; but even had the Desert Land Act contained such a stringent provision as the Timber and Stone Act contains, prohibiting speculative entries and prohibiting agreements to assign in advance of entry, it may well be doubted whether or not an entryman would not have a perfect right to make entry without the intention of reclaiming and with the intention of selling or assigning before reclamation, as both this court and the lower federal courts have distinctly held that an entry made un-

der the Stone and Timber Act *in contemplation of and with the intention of sale*, is not in violation of the law. See U. S. v. Budd, 144 U. S. 154, where this court says:

> "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. *All that it denounces is a prior agreement, the acting for another in the purchase.* * * * Montgomery might rightfully go, or send, into that vicinity and make known generally or to individuals a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government, and any person knowing of that offer might lawfully go to the Land Office and make application and purchase a timber tract from the government."

In Olson v. U. S., 133 Fed. 849-852, the court construes the meaning of the restriction in the Timber and Stone Act in the following language:

> "The statute only prohibited his entering the land under an agreement whereby he was acting for another; that he might make a valid entry of such land though with a view of disposing of the same after he had completed the purchase, provided at and before the time of such purchase he had not entered into an agreement with another whereby such other should receive the benefit of such purchase."

The court further says:

> "In U. S. v. D. T. & L. Co. this court held that what the statute prohibited was not

alone prior agreement that the title or any part thereof which the purchaser should acquire should be conveyed to another, but that the land should not be acquired on speculation for the use and benefit of another. In the light of these decisions, as well as a sensible construction of the statute, we have no hesitancy in holding its true meaning to be that any citizen of the United States may purchase land as herein provided where such purchase is for his own exclusive use and benefit, *notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit;* that what the statute denounces is that a party shall not, at the time of the purchase, have, directly or indirectly, made any agreement or contract in any way or manner with any person or persons by which the title which he may acquire shall inure, in whole or in part, to the benefit of any person except himself; that the application for the land must be made in good faith for his own exclusive use and benefit and *not as the agent or hireling of another to obtain the land for someone besides himself.*"

The same doctrine is maintained in the case of U. S. v. Detroit Timber & Lumber Co., 124 Fed. 393.

We think it is clear, from the reasoning of these cases, that even had the Desert Land Act contained stringent restrictions as to speculative entries and as to agreements to sell in advance of entry, an entryman would have had a perfect right to make an entry for his own use and benefit, but with the intention of later selling or assigning the entry at a profit before reclaiming the land.

The foregoing cases, we think, are conclusive that a desert land entry is assignable at any time after the original entry is made regardless of any authority to assign contained in the Desert Land Act itself.

(E) Desert Land Entries Under the Amended Act of 1891 are Assignable Because the Right of Assignment is Expressly Recognized by the Act and has been Uniformly Upheld by the Land Department.

Section 5 of the amended act provides "That no land shall be patented to any person under this act, *unless he or his assignors shall have expended*" the necessary three dollars per acre in its reclamation, etc.

Section 7 provides that at any time within four years after the filing of the desert land declaration, upon making proof of complete reclamation of the land, and upon payment of the further sum of one dollar per acre to the government "a patent shall issue therefor *to the applicant or his assigns;* but no person or association of persons shall hold, *by assignment* or *otherwise*, prior to the issue of patent, more than 320 acres of such arid or desert land."

The above quoted language is clear and unquestionable and seems without doubt to authorize the reclamation and expenditure to be made, either by the entryman or his assignee, and author-

izes patent to issue either to the entryman or to his assignee.

It is claimed, however, by the lower court in this, the Hammers case, that there is a conflict of language in the 5th section of the act, which casts such doubt upon the assignability of the desert land entries that he holds them to be non-assignable. The ground for this conclusion is that after providing that the applicant for patent, "*or his assignors*," shall have expended at least three dollars per acre in reclamation, the section provides that "*within* one year *the party so entering*, shall expend not less than one dollar per acre for the purposes aforesaid, and *he* shall in like manner, expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is expended. *Said party* shall file during each year with the register, proof by affidavit of two or more credible witnesses, that the full sum of one dollar per acre has been expended," etc.

The Land Department has harmonized this apparent conflict in the provisions of section 5 of the act by treating the section as if the words "or his assigns" were—by necessary implication—inserted after the words, "the party so entering" and after the word "he" and after the words "said party" as such expressions are quoted and underscored above. This produces a perfect harmony in the entire law, and removes all apparent dis-

cord, and makes it a workable and efficient means of reclaiming the arid lands of the United States, whereas, without the right of sale or assignment until after reclamation is fully accomplished, the act had proven so inefficient as to be practically a failure. This construction of the law, holding desert land entries to be assignable, established by the department, is in entire harmony with, and the principle that has been approved by this court's decisions in Webster v. Luther and Adams v. Church, Williamson v. U. S. and U. S. v. Biggs, above referred to, which specifically hold that the right of assignment need not *in terms* be granted by the sovereign authority, for it exists if not expressly prohibited or opposed to public policy.

Judge Wellborn in his decision in this, the Hammers case, rejected the argument that the words "or his assigns" must by necessary implication be inserted into the statute after the words "the party so entering" and after the word "he" and after the words "said party." Upon this subject he said: "If Congress had intended to confer the right of assignment during the progress of work of reclamation it would have inserted after each reference to the 'entryman' in some appropriate way the words 'or his assigns.' "

As we have already pointed out, Judge Wellborn seems by this language to have ignored the well established rule that *the right of assignment always exists unless expressly prohibited, and*

need not be expressly allowed. As he assumed the contrary to be the law, and that the right of assignment does not exist unless expressly conferred by statute; hence his conclusion that if Congress had intended the right of assignment to exist it would have inserted the words "or his assigns" after the word "entryman."

Even though the right of assignment had not been specially recognized by the amended statute in sections 5 and 7 as above pointed out, it is perfectly clear to us that relying upon the general doctrine that the right of assignment need not be expressly conferred but exists unless expressly prohibited, the Land Department was justified in inserting and reading into the statute the words "or his assigns" after the words "the party so entering" and after the word "he" and after the words "said party"; but in view of the obvious expressed intention of Congress to permit assignments by the use of the words "assignors" in section 5 and "assigns" and "assignment" in section 7 it would seem that there could be no question of the correctness of the department's action.

The Land Department, however, in construing the old Desert Land Law before it was amended in 1891 seems to have overlooked or disregarded this well established rule that the right of assignment exists unless expressly prohibited, and after a number of conflicting decisions upon the subject

on January 27, 1877, Secretary Lamar issued a circular containing the following language:

> "Section 2. Desert land entries are not assignable, and the transfer of such entries, whether by deed, contract or agreement, vitiates the entry."
>
> See 5 L. D., pages 708-709.

Although prior to the amendment of 1891 the Land Department rulings as to the assignability of desert land entries had been conflicting and had changed many times (see history of such conflicting rulings given in Henry W. Fuss, 5 L. D. 167, and in Arnold v. Christy, 33 Pac. 619), the construction of the statute and the practice adopted by the department seems to have been uniform since the amendment, holding that desert land entries are assignable at any time after the original entry. This was the well established and crystalized construction of the law during the period of time covered by the Imperial Valley reclamation enterprise, beginning about 1901 and continuing to date.

After the Act of March 3rd, 1891, was passed, the secretary of the interior issued on April 27, 1891, the following instruction to the registers and receivers concerning the Desert Land Act as amended, which contains the following provision concerning assignability:

> "7. Assignments are recognized but the amount of land that may be held by assign-

> ment or otherwise prior to the issue of patents is restricted to 320 acres by the 7th section, which section it is provided, however, shall not apply to entries made prior to the act. Assignees must properly prove their assignments by filing in the local office an affidavit and certified copy of the instrument under which they claim and must make affidavit of the amount of land held."

Later on, in the letter of instructions, the following is found:

> "In future a preliminary affidavit will be required to conform to these amendments, proper blank forms for which will be prepared and transmitted as soon as practicable. * * * It will be necessary to prepare and transmit a number of blank forms for proofs and affidavits under this act, which will be done without unnecessary delay."
>
> 12th L. D. 405.

It will be observed that in this letter of instruction there is no restriction or limitation upon the right of assignment as to time of making the same, and in view of these circular letters of the department, the subsequent conduct of the office is material.

On January 22, 1895, the following case came before Secretary Smith, on appeal from the commissioner of the General Land Office. The statement of the facts in the case as contained in the secretary's letter, is as follows:

"The record in this case shows that Henry McPhoul filed his declaration of intention *March 20, 1892*, to reclaim desert land described above, under the acts of Congress of March 3rd, 1877 (19 Stats. 377), and March 3rd, 1891 (26 Stats. 1095), and on *November 18, 1892*, he transferred the same to Fred W. Kimball of Oakland, Alameda county, California. On *April 8, 1893*, Kimball as assignee, presented his own affidavit and those of James C. Kimball and Eliza Kimball made before the register of the Land Office at Tucson, Arizona, setting forth the amount of money expended by the assignee during the first year of the entry. The several affiants say in their separate affidavits that they are 'of Los Angeles, California.' This proof having been forwarded, your office by letter of August 15, 1893, declined to recognize the assignment on the ground that the assignee, not being a resident of the territory within which the land is located, could not make final proof and entry, and inasmuch as he could not do so, the assignee would not be permitted thus to hold the land for three or four years."

In re Fred Kimball, 20 L. D. 67.

The assignment was upheld; see page 70.

It will be seen that the department here clearly recognized the assignability of a desert land entry almost immediately after the declaration and prior to the expenditure of any money. The assignee in this case having made the expenditure the first year.

While this is not a decision in so many words, that an assignment may be made *immediately*

after entry, it so clearly recognizes such right that it would seem strange that anybody would question the attitude of the department upon the proposition after its decision that Kimball's affidavit should be received, notwithstanding he was an assignee and a non-resident of Arizona.

In discussing this right to assign an entry to a non-resident of the state or territory, the department used, in the Kimball case, *supra*, the following pertinent language:

> "Congress contemplated an assignment of these desert land entries. The object of making this class of entries an exception to the unvarying rule—except as to coal entries—can be readily understood. It is a matter of common knowledge that the effecting of a thorough or sufficient reclamation of desert lands in many instances involves the erection of permanent dams or reservoirs for the purpose of storing the water in the season when at flood, and the construction of canals for carrying the water many miles in length. From these canals lateral ditches must be run to the particular tracts to be irrigated. All this means permanent structures on exact grades to prevent washing; headgates wherever the lateral ditches leave the main canal, constructed accurately to avoid waste, and so that the quantity of water required may be exactly measured. It is needless to say, perhaps, that all this requires a greater amount of capital oft times than can be furnished by the residents in the desert land country. To induce those of our people who have the money to further these great enterprises, Congress wisely provided that these desert

> entries might be transferred under certain limitations and restrictions so that the assignees who have invested capital in the construction of these water-ways might be assured of some compensation for their outlay. If the construction heretofore placed on this act is to prevail, that the assignees must also be resident citizens of the state or territory where the land is located, it might defeat the object Congress had in view."

Here the secretary is calling attention to the necessity of getting money for reclamation. That is to say, it might and often is the case that the man who makes an entry is not able to carry forward reclamation. Reclamation was the thing to be desired, and the government was willing that any citizens of the United States might expend this money, regardless of where he resided, or who made the application.

The court's attention is also called to the decision of Acting Secretary Ryan in the case of Gasket v. Butler's Heirs, 27 L. D. 721, 722, where the court says, in referring to Sec. 7 of the Desert Land Act as amended:

> "This is, however, not the only provision of the amendatory act authorizing or recognizing assignments of desert land entries, because Sec. 5 of these added sections also plainly contemplates that *assignments may be made of desert land entries during the period allowed for the reclamation and improvement of the lands embraced therein.*"

Again, in the case of Luther J. Prior, 32 L. D. 608, 609, Secretary Hitchcock said:

> "The Act of March 3rd, 1891, added five sections numbered 4 to 8, inclusive, to the Desert Land Act of March 3, 1877, sections 5 and 7 of which *the department holds gives the entryman the right to assign at any time prior to submission of final proof.*"

This established and uniform construction by the Land Department of the Desert Land Act, as amended in 1891, holding desert land entries to be assignable at any time after entry having prevailed for over eighteen years—whether right or wrong—has been relied upon, and acted upon by persons throughout the country dealing with desert lands and has become a rule of property affecting interests of great value, and should not be set aside by the courts except upon the most cogent and convincing reasoning.

(F) Where the Construction of a Public Land Statute has Become Well Settled and Established by the Practice and Decisions of the Land Department and has Become a Rule of Property, it will not be Disturbed by the Courts Except for Most Cogent Reasons, or to Prevent Palpable Injustice.

The true rule upon this subject is set forth in the following cases by this court: In Brown v. U. S., 113 U. S. 568, 28 L. Ed. 1079, it is held, quoting from syllabus:

> "Contemporaneous construction which is uniform, given to a statute by those charged with the duty of executing it, ought not to be overruled without cogent reasons."

And, in the body of the opinion, the following language occurs:

> "It must be conceded that were the question a new one, the true construction of the section would be open to doubt. But the findings of the Court of Claims show that soon after the enactment of the act, the president and the navy department construed the section to include warrant, as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. The contemporaneous and uniform interpretation is entitled to weight in the construction of the law and in a case of doubt ought to turn the scales."

In Edwards v. Darby, 12 Wheat. 206, it was said by this court:

> "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect is entitled to great respect."

In U. S. v. Moore, 95 U. S. 763, the court said:

> "The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The officers concerned are usually able

men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

And in the case of U. S. v. Pugh, 99 U. S. 265, the court said:

"While, therefore, the question (the construction of the abandoned and captured property act) is one by no means free from doubt, we are not inclined to interfere at this late date with the rule which has been acted upon by the Court of Claims and the executive for so long a time."

All of the above quotations are contained in the body of the opinion, Brown v. U. S., *supra*, after quoting which the court then says:

"These authorities justify us in adhering to the construction of the law under consideration adopted by the executive department of the government, and are conclusive against the contention of appellant that section 23 of the Act of March 3d, 1861, did not apply to warrant officers."

When Chief Justice Taney was United States attorney general, he laid down the rule upon this subject as follows:

"When an act of Congress has by actual decision or by continued usage and practice, received a construction by a proper department, and that construction has been acted upon for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it."

See 2 Opinions Attorney General, page 558.

Justice Brewer of this court, while upon the Circuit Bench, in the case of United States v. Pacific Railway Co., 37 Fed. 551, in speaking of the binding force of the departmental construction of a statute, at page 555, quotes at large from the authorities on the subject; after giving many excerpts from the Supreme Court decisions, he closes the same as follows:

> "Justice Blatchford said in United States v. Hill, 120 U. S. 169, 'that the principle contended for has been applied by the Supreme Court as a wholesome one for the establishment and enforcement of justice between the government and those who put faith in the action of its constituted authorities, judicial, executive and administrative'; and Justice Field, in Robertson v. Downing, 127 U. S. 607, said, 'It ought not to be overruled, without cogent reasons.' It is well said by counsel that 'It is interesting to note the growth of this principle in our law from the time Justice Trimble announced it so cautiously in 1827, it has gained strength every time it was again considered by the court, impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."

The doctrine was strongly stated in U. S. v. Johnston, 124 U. S. 236, by Mr. Justice Harlan, in the following language:

> "In view of the foregoing facts, the case comes fairly within the rule often announced by this court that the contemporaneous con-

> struction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, unless it be clear that such construction is erroneous."

The doctrine was still more strongly stated in Shell v. Fauche, 138 U. S. 572, by Mr. Justice Brown in the following language:

> "In all cases of ambiguity, the contemporaneous construction not only of the courts but of the departments and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

We submit that as the Desert Land Act has been uniformly construed for over eighteen years by the Land Department as permitting assignments of entries at any time after the entry was made, that even if the true construction of such act is doubtful—which to us it does not seem to be—still, such construction is binding upon the courts at this late date and to upset it now would be most disastrous upon the title of thousands of assigned desert land entries now existing and made, relying upon such construction of the law, and to hold that desert land entries are not assignable and that perjury could not be predicated upon the false affidavits of assignees and their corroborating witnesses as to reclamation, would open the door to wholesale actual fraud upon the government.

(G) The Reasons Urged for now Rejecting the Land Department's Construction of the Desert Land Act as to the Assignability of Entries.

Let us examine the cogency of the reasons urged by Judge Wellborn for rejecting the Land Department's construction of the Desert Land Act, holding entries to be assignable at any time after the original declaration is filed. The chief reason urged for upsetting at this late date this long continued construction of the Desert Land Act, which has proven, and is proving such an efficient means of reclaiming the arid lands of this country from their worthless desert state, is that this course is necessary to reconcile the apparent conflict in certain language in section 5 of the act with other language in such section, and other language in section 7 of the act.

In the first place, the language provides that "no land shall be patented to any person under this act, *unless he or his assignors* shall have expended" the necessary three dollars per acre in its reclamation; the act then proceeds to say that "the parties so entering" shall make such expenditure, without adding the words "or his assigns" to make the language conform to that previously used, or to conform to that subsequently used in section 7 of the act, where it is provided that "a patent shall issue therefor to the applicant, *or his assigns*, but no person or association of persons

shall hold by assignment or otherwise, prior to patent, more than three hundred and twenty acres of such arid or desert land."

In construing this statute, the department has held, reading the whole act together, that it was clear that Congress intended to confer the right of assignment of entries and to permit the necessary reclamation to be made, either by the applicant for patent "or his assignors," and consequently, held that—by necessary implication—the words "or his assigns" must be read into the act after the words, "parties so entering," so as to make it conform to the previous and subsequent language of the act and to the evident purpose of the act.

It must be conceded that if the right of assignment before reclamation was clearly given by the statute, it would follow by necessary implication that the assignee could make the proof of reclamation; and even though there may be some doubt as to whether the statute clearly gives the right of assignment, if the statute does not prohibit assignment, then the right of assignment exists by virtue of the general law, as completely as if expressly conferred by the statute. This seems the complete answer to the argument that to reconcile these provisions, it is necessary to reject as meaningless, or as unintended the provisions which permit the reclamation to be made by the applicant

for patent "or his assignors" and which permits patents to the entryman "or his assigns," and which contemplates the holding of land, prior to patent, by "assignment" in tracts of three hundred and twenty acres or less.

THE ARGUMENT OF THE LOWER COURT THAT THE ONLY ASSIGNMENT RECOGNIZED BY THE DESERT LAND ACT, AS AMENDED IN 1891, IS AN ASSIGNMENT AFTER RECLAMATION HAS BEEN FULLY ACCOMPLISHED AND THE WHOLE PURCHASE PRICE PAID AND THE TITLE FULLY EARNED. IN OTHER WORDS, AN ASSIGNMENT AFTER EQUITABLE TITLE HAS FULLY VESTED IN THE ENTRYMAN.

In his opinion in this, the Hammers case, Judge Wellborn explains away the provisions of sections 5 and 7 of the Desert Land Act of 1891 referring to "assignors," "assignments," and "assigns," by holding that these expressions all refer to assignments made after the reclamation of the land has been completed and the law fully complied with and the equitable title vested in the entryman. It seems to us a complete answer to this position is, that if this were the only purpose of the language it was wholly unnecessary, as the law is well established that after the full equitable title has vested, the right of assignment exists without being expressly granted, and *even though*

the statute expressly prohibits assignments until patent issues.

See the case of Meyers v. Crafts, 17 Wall. 291, which holds that although section 12 of the Preemption Act of September 4, 1841 (5 Stat. 453), provided that "the assignment and transfer of the right hereby granted, prior to the issue of patent shall be null and void," yet notwithstanding such provision, the statute does not prevent the preemptor from selling the land *after final entry and before patent.*

This case emphasizes how far the courts have gone in their antipathy to any restraint on alienation of land entries, and demonstrates that even had the Desert Land Act expressly prohibited assignment, the right to assign, *after the full equitable title was earned* would nevertheless have existed without any such language concerning assignment as is contained in sections 5 and 7 of the Desert Land Act. This case of Meyers v. Crafts has been repeatedly approved by this court, namely, in the cases of Webster v. Luther, Adams v. Church, and Williamson v. U. S., already referred to in this brief.

According to the decision of Judge Wellborn in this case, the words "assignors," "assigns" and "assignment" incorporated into the amendment of 1891 are merely "an incidental reference to a right already existing," viz.: to the right to assign after complete equitable title had vested. In

other words, this part of the amendment, under the interpretation of the lower court, adds nothing to the rights which already existed under the old law; for as already pointed out, after the equitable title has vested, the right of alienation exists regardless of the statute.

Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339;

Stark v. Starrs, 73 U. S. 402-419, 18 L. Ed. 925, 827;

Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86;

Myers v. Croft, 13 Wall. 291, 20 L. Ed. 562;

Quinby v. Conlan, 104 U. S. 420-427, 26 L. Ed. 800;

Deffeback v. Hawke, 115 U. S. 393-405, 29 L. Ed. 423;

Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 36 L. Ed. 762;

Hawley v. Diller, 178 U. S. 476, 44 L. Ed. 1157;

U. S. v. Freyberg, 32 Fed. 195.

Thus we have Congress resorting to idle and vain acts in incorporating language into a statute, and that statute an amendment to a statute in which such language did not occur, without intending that this language should have any effect or in any wise add to the meaning which the lan-

guage of the statute would convey were such language omitted.

Such a construction violates one of the fundamental and familiar canons of statutory construction. It is the rule that the legislature intends that all the language in a statute shall have effect, and the courts will treat none of it as surplusage, unless there is no way to give it effect. The reason for this rule makes it even more incumbent upon the court when considering amendments in which language is used which did not occur in the original statute, to endeavor to give effect to the added language if possible; it being a fair assumption that the particular matter must have been called to the legislative attention.

The Supreme Court of California has enunciated this doctrine in the following language:

> "The statute must be so construed as to give effect, if possible, to every portion of it, and without rejecting any part as surplusage or treating it as a *repetition of a provision already made.*"
>
> Gates v. Salmon, 35 Cal. 576-578.

And again in a very late case by the same court:

> "We cannot assume that the object of the insertion of the proviso in the Act of 1901 was *simply to authorize that to be done which was already fully authorized by the language of the former act.*"
>
> City of San Diego v. Potter, 153 Cal. 288-294.

On the same general doctrine see:

Montclair v. Ramsdell, 107 U. S. 147;
Ogden v. Strong, 2 Payne 584;
U. S. v. Warner, 4 McLean 463;
Cook v. Hamilton Co., 6 McLean 112;
In re Mathews, 109 Fed. 615;
U. S. v. York, 131 Fed. 323;
Colam v. U. S., 133 Fed. 440;
People v. Matsell, 94 N. Y. 179;
Germyn v. Scranton, 212 Pa. St. 598;
French v. Teschemaker, 24 Cal. 557;
People v. King, 28 Cal. 265;
San Diego v. Granis, 77 Cal. 511.

Therefore we are justified in assuming that when Congress included the language "his *assignors*" in section 5, and the language "patent shall issue therefor to the applicant or his *assigns*" in section 7, and "no person or association of persons shall hold by *assignment* or otherwise" in section 7, it was the intention of that legislative body that such language should have effect and add meaning to or make clear the meaning of that which already existed in the statute which it was amending.

The Interpretation Sought to be Placed Upon the Statute by the Lower Court Is Contrary to the Spirit of the Entire Act, and Directly Contravenes the Plain Intention of the Amendments.

The original Desert Land Act of 1877 provides for the acquiring by an entryman of as much land as six hundred forty acres, and allowed this land to be held for three years without any proof of reclamation being made. No language was in this original act respecting assignments. As has already been shown, the Land Department at first recognized assignments under the original act and quite justly, we are convinced, from the decisions; yet subsequently reversed its rulings and did not allow assignments to be made.

The most important changes incorporated into the act by the added sections are the limiting of the amount of land that could be taken by the entryman to three hundred twenty acres, the requiring of annual proof of expenditures to be made, the addition of one year to the time allowed for complete reclamation and the offering of final proof, and the language concerning assignments. Quite naturally in the original act, there being no language concerning assignments, that statute was silent as to the amount of land that might be held by assignment; but when the amendment was added providing for assignments, *it would be nat-*

ural for Congress to place a restriction upon the amount of land that could be held by assignment.

In order to interpret a statute properly, it is necessary that the intent of the legislature be arrived at, if possible. What, therefore, was the intent of the legislature in limiting the amount of land a desert land entryman or his assignee could hold? Plainly to prevent the accumulation in the hands of one person of large tracts of desert land prior to reclamation, thereby avoiding speculation in these lands. But if this restriction were put upon the entryman alone, and not upon the assignee, it would be easy to defeat the object of the act, for people might be persuaded, or might take up land in good faith and afterwards sell it in large quantities to speculators, who would ultimately acquire title thereto. Therefore it would be necessary to limit the amount of land that could be held by assignment to an amount equal to that which could be taken by the entryman. But after complete reclamation and the vesting of equitable title, how could it be said that the reason for the original limitation remained? Admittedly nothing but the naked legal title remains in the government. Complete reclamation has been accomplished, a permanent adequate water right has been secured, all the money the government can expect from the land has been either received or tendered and there can be no inducement to specu-

lation against which the government should legislate.

The recognition of the right of assignment by the Desert Land Act, therefore, cannot be accounted for on the theory that it is intended to authorize assignments after the full equitable title has been earned, and such theory must therefore be rejected.

THE DISASTROUS CONSEQUENCES THAT WOULD RESULT FROM NOW REJECTING THE LAND DEPARTMENT'S CONSTRUCTION OF THE DESERT LAND ACT.

The court will take judicial notice that for over eighteen years ever since the amendment of 1891, the Land Department—charged with the interpretation and administration of the Desert Land Act—has uniformly held that a desert land entry could be lawfully assigned to a qualified assignee at any time after entry. Printed forms of affidavit to be filed by assignees at the time of filing assignment were promulgated and used by the department. Soon after the passage of the Act of 1891, the practice was established by the department of accepting assignments, accompanied by the prescribed affidavit showing the assignees to be duly qualified to take under the law, and it soon became the established practice to accept the annual affidavits of proof of expenditure made by the assignees. This practice has continued with-

out interruption for over eighteen years. Relying upon this construction of the law by the department, thousands of desert land entries throughout the country have been assigned to innocent assignees, and years of time and great sums of money have been expended by such assignee in reclaiming and improving such lands.

To show what has been the Land Office practice as to assignments, it is only necessary to consult the printed form of affidavits required by the Land Department from assignees of desert land entries. See such form of affidavit appearing on page 300 of the General Land Office circular dated January 24, 1904, which is as follows:

"(4-074a.)

"Affidavit required of parties appearing as *assignee* of original entryman.

DESERT LAND ENTRY.

(Acts of March 3d, 1877, and March 3d, 1891.)

I, ... of ..... claiming to be *assignee* of ..... who made Entry No. .... of the .... of section .... in Township ..... of Range ..... on the ..... day of ....., 19..., at the District Land Office at ....., do solemnly swear that I am a *bona fide* resident citizen of the state or territory of ..... and a ..... citizen of the United States, or have declared my intention to become a citizen of the United States; that the said ..... who made said entry did on the ..... day of ....., 19..., transfer his right thereunder to me, by virtue of deed or instrument of writing of which a certified copy is herewith attached, and *further, that I do not hold, by assignment or otherwise, more than*

three hundred and twenty acres of land entered under said acts, the only lands so held by me being described as follows, and being embraced in entries indicated as follows, viz.: .....; *that since August 30, 1890, I have not acquired title to, nor am I now claiming under any of the agricultural public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate three hundred and twenty acres*, except ..... of section ..... Township ..... of Range ..... entered by ..... on the ..... day of ....., 19... Entry No. ....., series,

My postoffice address is .....

(Sign plainly with full Christian name.) .....

Sworn to and subscribed before me this ..... day of ....., 19..., at my office in ....., County ....."

The practice was, and this form shows, that no inquiry was made of an assignee as to whether or not he had previously made or then held another desert land entry, or as to whether he had previously bought and sold such entries, but the only thing he had to swear to was that "I do not *hold*, by assignment or otherwise," more than 320 acres of land entered under such acts.

This court will take judicial notice of the practices and records of the Land Office, and is charged with knowledge that it was customary for parties to buy and sell desert land entries before reclamation, just as they would have bought and sold any other species of property, so long as each time an assignment was filed in the Land

Office the assignee could swear that he did not *then* "hold, by assignment or otherwise" more than 320 acres of such desert land. And the court will take judicial notice that of the thousands of entries of desert lands in the Imperial Valley, the great majority of them were assigned with the Land Office approval before reclamation, and many of them assigned many times, and that property worth millions of dollars now depends upon the validity of such assignments.

It is true that the jeopardy in which such titles have been placed by Judge Wellborn's decision in this case has caused Congress to pass the Remedial Act of June 25, 1910, to which we have heretofore referred, validating desert land titles in Imperial County, California, only, held under assignments, upon the assignees showing affirmatively good faith and lack of notice and knowledge of any fraud affecting the original entry; but should Judge Wellborn's decision in the Chaplin case become the established law,—namely, that an entry made with the intention of assignment or sale before completion of reclamation, is a *fraud* upon the government,—then knowledge on the part of the assignee that the original entry was made with the intention of profiting by a sale before reclamation would taint the assignment, and constitute it an assignment *in bad faith with notice that the original entry was fraudulent;* and

no matter how honestly the assignee may have believed that the original entry was lawful, or how honestly the original entryman may have believed that he had a right to make such an entry, the assignment would be illegal. In other words, the assignee's title is still in danger even in Imperial County, in California, covered by the remedial act, if the original entry was made without the intention of personally reclaiming the land, unless the assignee affirmatively proves that he had no knowledge of such intention, which in many cases, might be impossible to do, as (until this new doctrine of *fraud* was recently inaugurated) *people generally believed that an entryman had the right to intend to personally reclaim or to assign;* and knowledge that an entry was made without the intention of personally reclaiming would never have raised any question in the mind of an assignee that the entry was fraudulent. So, notwithstanding the remedial statute above referred to, *which applies only to lands in the Imperial Valley in California*, it must be obvious that a cloud is cast upon the title to all desert land entries, if their validity is made to depend upon the question as to whether or not the original entryman intended to reclaim the land, or to assign his entry, and as to whether or not the assignee of such an entry had knowledge or notice of such intention.

In conclusion, we submit that it follows from the foregoing that a person has the legal right to assign a desert land entry at any time after his entry is made and to make an entry with the intention of assignment whenever opportunity offers.

Respectfully submitted,

OSCAR A. TRIPPET,
J. M. ESHLEMAN,
LECOMPTE DAVIS &
WM. C. PRENTISS,
Amici Curiae.

APPENDIX.

Original Desert Land Act of March 3rd, 1877.

AN ACT TO PROVIDE FOR THE SALE OF DESERT LANDS IN CERTAIN STATES AND TERRITORIES. (19 Stats. 377.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such," and upon payment of twenty-five cents per acre, to file a declaration under oath, with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land, not exceeding one section by conducting water upon the same within the period of three years thereafter; *Provided, however*, that the right to the use of water by the person so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and if unsurveyed

shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him; *Provided, however*, that no persons shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres, which shall be in compact form.

Sec. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the Land Office in which said tract of land may be situated.

Sec. 3. That this act shall only apply to and take effect in the states of California, Oregon and Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Approved March 3, 1877. (19 Stat. 377.)

Amendment to Desert Land Act of March 3rd 1891. (26 Stats. 1095.)

Sec. 2. That an act to provide for the sale of desert lands in certain states and territories, approved March third, eighteen hundred and sev-

enty-seven, is hereby amended by adding thereto the following sections:

Sec. 4. That at the time of filing the declaration hereinbefore required, the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections or fractional parts of sections, of desert land, may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation and cultivation thereof by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least $3 per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than $1 per acre for the purposes aforesaid; and he shall in like manner expend the sum of $1 per acre during the second and also during the third year thereafter, until the full sum of $3 per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of $1 per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing

the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the land shall revert to the United States, and the 25 cents advance payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then make the required proof of reclamation to the aggregate extent of $3 per acre; *Provided*, that proof be further required of the cultivation of one-eighth of the land.

Sec. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land, to the extent and cost in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no

person or association of persons shall hold, by assignment or otherwise, prior to the issue of patent, more than 320 acres of such arid or desert land; but this section shall not apply to entries made or initiated prior to the approval of this act; *Provided, however*, that additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be cancelled, and the lands and moneys paid therefor shall be forfeited to the United States.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the state of Colorado, as well as the states named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the state or territory in which the land sought to be entered is located.

UNITED STATES *v.* HAMMERS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 314. Argued April 12, 13, 1911.—Decided May 15, 1911.

Under the Desert Land Act of March 3, 1877, c. 107, 19 Stat. 377, as added to by the act of March 3, 1891, c. 561, 26 Stat. 1096, a desert land entry is assignable.

Where a statute is so ambiguous as to render its construction doubtful the uniform practice of the officers of the Department whose duty has been to construe and administer the statute since its enactment and under whose constructions rights have been acquired is determinatively persuasive on the courts.

There is confusion between the original desert land act of 1877 and the act as amended in 1891 as to whether entries can be assigned, and the court turns for help to the practice of the Land Department in construing the act, and that has uniformly been since 1891 that entries were assignable.

THE facts, which involve the construction of Desert Land Acts of 1877 and 1891 and the assignability thereunder of entries of desert lands, are stated in the opinion.

Mr. Ernest Knaebel, for the United States.

Mr. L. H. Valentine, with whom *Mr. Nathan Newby* was on the brief, for the defendant in error.

Mr. Oscar A. Trippett, *Mr. J. M. Eshleman*, *Mr. LeCompte Davis* and *Mr. William C. Prentiss* filed a brief, by leave of the court, as *amici curiæ*, in support of the position of the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case is here to review an order sustaining a demurrer to an indictment found against defendant in error, herein called defendant.

Omitting the repetitions and accentuations which are usually found in indictments, the following are the facts stated in the indictment in this case: On the fourteenth of August, 1907, one Granville M. Boyer made a desert land entry for certain lands under the public land laws of the United States, and particularly under and by virtue of the act of Congress approved March 3, 1877, 19 Stat. 377, c. 107, or 2 U. S. Comp. Stat. 1548, the land being then open to entry, settlement and reclamation and he having the proper qualifications under the laws. The record was number 3903. On the twenty-sixth of August he assigned, by an instrument in writing, his entry and his interest in the land which was the subject thereof to one Beulah Rose Beekler, she being a citizen of the United

States. She filed the assignment with the Register and Receiver of the United States land office of the Los Angeles, California land district.

On the thirtieth of January, 1908, and while entry No. 3903 was pending before the Register and Receiver, Beulah Rose Beekler, "in pretended compliance" with the public land laws of the United States and the rules and regulations of the General Land Office of the Department of the Interior relating to desert land entries, applied at the office of one Daniel Elder, clerk of the Superior Court of Imperial county, within the southern division of the southern district of California, to make her first yearly proof of improvement, irrigation, reclamation and cultivation of the land, with the intention of thereafter obtaining a patent from the United States therefor. Elder was an officer authorized to receive such proof and to administer oaths to witnesses.

Defendant appeared and gave testimony in such proceeding and subscribed the same, swearing that the statements therein were true.

The specific details of his testimony are not necessary to the points of law which are involved. It is enough to say that it is set out in the indictment with particularity and showed that the improvements required by the desert land laws were made, and it is charged, that the testimony was wilfully and corruptly given, he knowing it to be false. And it was further charged that the testimony was filed with the Register and Receiver as part of the proceedings in relation to the entry.

The indictment was demurred to on the ground that it did not state facts sufficient to constitute an offense against the United States. The demurrer was sustained.

The question of law in the case is the materiality of defendant's affidavit, and that again depends upon whether the desert land laws authorized an assignment of the entry.

These propositions have been argued at great length. Besides oral argument a brief of 71 pages is presented by the United States, which is replied to by defendant's brief of 132 pages, and supported by a brief of *amici curiæ* of 135 pages, and there are supplemental briefs besides. In our view, however, the case does not require so much expansion, and for its general discussion we may refer to the able opinion of the court below. We disagree, it is true, with that learned court, but the grounds of our disagreement can be briefly stated.

We may assume that under the Desert Land Act of 1877, an entry was not assignable. The contention of the Government, however, is, opposing that of the defendant, that by the additions made by §§ 5 and 7 of the act of March 3, 1891, 26 Stat. 1096, c. 561, to the desert land law an entry is assignable. These sections read as follows:

"SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and

extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided. That proof be further required of the cultivation of one-eighth of the land.

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be cancelled, and the lands and moneys paid therefor shall be forfeited to the United States."

The learned District Court in its discussion, stated

that the following proposition is established: "Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government," citing, among other cases, *Myers* v. *Croft*, 13 Wall. 291; *Deffeback* v. *Hawke*, 115 U. S. 393; and this ownership and right of assignment the court concluded §§ 5 and 7 only recognized. In other words did not grant or create a new right, but referred to a right already existing, and that, therefore, the act of 1891 did not authorize an assignment of the land by an entryman until he had acquired such equitable title by the performance by him, and by him only, of the conditions prescribed.

It was conceded that the Interior Department had uniformly placed upon the act of 1891 a different construction in five decisions, the earliest of which was rendered on December 22, 1895, and the last in June, 1900, and it was also conceded that the rule often authoritatively announced is that "where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive if not controlling." Such decision, however, it was said, only determined in cases of doubt, and, as the court found no ambiguity in the act, decided against the ruling of the Department and the contention of the Government. It recognized the force of such a uniform practice in the Land Office and of the fact which was urged upon its attention, that a large number of reclamations had been effected by assignees in the very valley where the entry in controversy had been made, and said that such fact and practice would resolve doubts in favor of the Government, if it, the court, had any.

We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land

Department the weight to which in such case, the court acknowledged, they are entitled.

The act of 1891, was an amendment of the act of 1877, and made a change in the latter act, and a change in the provisions of an act usually indicates, or is intended to indicate, a change of purpose, to enlarge or restrict the provisions of the prior law. This very natural presumption seems to be contested by defendant. We say "seems" because it may be that it is only its application in the present case which is questioned. Counsel say the "intent to amend, modify or repeal any provision of the act of 1877, must be made clearly to appear by the terms of the amendatory act." In support of this it is urged that the dominant purpose of the act of 1877, was that an entryman should personally reclaim the land in the manner prescribed by the act, and because of the purpose and to secure it, the courts and the Department had ruled that before reclamation the entryman had no rights which he could transfer. Counsel, therefore, deny that a change was made in the act of 1877 by the act of 1891, and urge that where a statute which had been construed by the courts has been reënacted in the same, or substantially the same, terms, the legislature is presumed to have adopted the construction as part of the law unless a different intention is expressly declared. But was there a substantial reënactment of the act of 1877 by the act of 1891? In the act of 1877, the word "assignors" did not appear at all, and the act required, it is contended, that reclamation should be personally made by the entryman. To this requirement the opening words of § 5 of the act of 1891 present a contrast. It reads: "That no land shall be patented to any person under this act unless *he or his assignors* (italics ours) shall have expended in the necessary irrigation, reclamation, and cultivation thereof . . . three dollars per acre for the purpose aforesaid. . . ." The meaning of these words con-

sidered alone is clear. An entryman or his assignors may make reclamation. It is said, however, that the words which follow them explain them and take all ambiguity from them. It is provided that "within one year after making entry . . . the party so entering shall expend not less than one dollar per acre" and that *he* (italics ours) "shall in like manner" expend the same sum during the second and third year. "Said party," it is further provided, "shall file the proofs of such expenditure" and at the expiration of the third year a map or plan showing the character and extent of such improvements." And again: "If any party fail to file the proofs the entry shall be canceled." It is finally provided that nothing in the section contained "shall prevent the claimant from making *his* final proof and receiving *his* patent at an earlier date than that prescribed for the performance of the conditions required. These provisions, it is insisted, designate the entry and entryman and only him. This is made indubitable, it is urged, by the use of the pronouns "he" and "his," excluding every other person, and requiring the expenditure and improvements to be made by him individually. But the opening sentences of the section are to be accounted for, and these are, to repeat, "That no land shall be patented to any person under this act unless *he or his assignors* shall have expended in the necessary irrigation, reclamation, and cultivation thereof . . . at least three dollars per acre. . . ," and the word "assigns" is also used in § 7. Counsel feel the necessity of accounting for the provision and to give it a meaning that will neither contradict nor make doubtful that for which they contend. Their explanation is, "that Congress used the words 'or his assignors' in § 5 and 'or his assigns' in § 7 only in recognition of the right that every entryman has under any of the public land laws of the United States to make an assignment after he has acquired the equitable title to the land embraced within

his entry." In other words, as observed by the court below, a new right was not created, but a right already existing was incidentally referred to. In aid of this conclusion, and in opposition to the contention made by the Government that "assignors" designated persons who may legally do the things prescribed in § 5 before the equitable title vests, it is answered that an applicant can have more than one assignor but they must be assignors of perfected entries, perfected by the performance of the conditions by the respective entrymen. Examples are given under the practice which obtained in the Land Department prior to 1908 (an act of that year limits the assignment to one) of issuing patents to an applicant who had taken assignment of more than one entry if the aggregate area of the land embraced in the entries did not exceed 320 acres. But to support this view reliance is had upon decisions made after the act of 1891, and which, it is admitted, "apply to assignments made before the vesting of equitable title, as permitted by the Land Office since 1891." That, it is insisted, is not material so far as the point is concerned. But manifestly it is material. To support and give force to a practice of the Land Department under the act of 1891, to impugn its construction of the act, is certainly confusing. We cannot assume that the Land Department did not know what it was about and made its practice under the act oppose its construction of the act. But, it may be granted that there is strength in the argument, and in that based on the words of the statute. They are, however, opposed by arguments of equal, if not greater strength. Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coinci-

dent with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.

We are constrained, therefore, to reverse the order of the District Court sustaining the demurrer and remand the case for further proceedings.

Reversed.